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AUTHOR Littleton, Richard K.

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ABSTRACT

The history of the territorial sea and legislative practices associated with its boundaries are examined in this study. The survey includes information related to: (1) the history of territorial zones (tracing evolutionary development and impacts); (2) United States practices (examining the purpose of authority asserted in the territorial sea); (3) the status of the territorial sea; (4) changes in the boundaries; (5) resource legislation (emphasizing mineral resources and fisheries); (6) alternative scenarios (projecting impacts of the adoption of the 12-mile limit); (7) coastal and landlocked states (discussing legislative effects on the states); (8) planning (posing questions related to boundary laws); and (9) zone A in operation (offering perspectives on the 50-state sharing arrangement). (ML)

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THE TERRITORIAL SEA: PROSPECTS FOR THE UNITED STATES.

by
Richard K. Littleton, J.D.

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THE TERRITORIAL SEA:

PROSPECTS FOR THE UNITED STATES

by

Richard K. Littleton
Staff Attorney
Mississippi-Alabama Sea Grant Legal Program

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FORWARD

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ABSTRACT

This study of the territorial sea examines the history of the territorial sea, and then explores the effects on domestic federal law, on federal-state relations, and on state-state relations if the recent international trend toward a 12-mile limit is followed by the United States.

In the first section, the paper examines practices by various sea-faring peoples and nations which contributed to the evolution of the territorial sea zone. The uncoordinated evolution of this zone in traditional international law is briefly contrasted with the more planned and uniform Convention on the Law of the Sea. The U.N. Convention is not, however, explored in depth. The first section ends with a discussion of the United States' approach to the territorial sea.

The second section reviews the change in the status of the United States territorial sea from a state-managed to a federally regulated area. The discussion covers the congressional reaction to a 1947 Supreme Court decision declaring the territorial zone a federally dominated zone; the return of ownership of the territorial sea to the states; and the evolution of federal control beyond and within the territorial sea. Assuming the likelihood that the United States will adopt a 12-mile limit in the future, the paper offers 2 scenarios. In one scenario, only the national territorial limit is extended out to 12 miles. This causes almost no changes in coastal law or in federal-state relations. In the second, both the national and the state boundaries are broadened to 12 miles. It is this second scenario which creates the greatest challenge to federal and state relations because this scenario affects control over mineral and fishery resources. This part of the paper includes a discussion of the inland states' unexpected stake in the mineral resources of a 12-mile territorial sea.

The paper concludes with a glimpse of the operation of a 50-state revenue-sharing plan focused on the expanded territorial sea.

The Territorial Sea: Prospects for the United States

I. INTRODUCTION

The territorial sea is the narrow zone of ocean lying along the shore of every coastal nation. This zone amounts to a watery belt of modified national sovereignty reaching out into the ocean. The term, "sovereignty" refers the legal power every nation has to control events inside its borders.[1] Within this ocean belt called the territorial sea, the coastal nation exercises sovereignty much the same way it does within the land territory. However, the boundaries of, and powers proclaimed within, this narrow territorial sea are not as precise and distinct as one expects to find within dry-land boundaries. The surprising fact about the territorial sea is that, in spite of the rules of international law, it is not an isolated zone of clearly established jurisdiction, but instead constitutes only one part of a system of related, interdependent, and sometimes unclear zones extending seaward from the coast.

This indefinite character has typified the coastal claims of nations throughout the history of the development of the territorial sea zone. One writer on ocean law, Thomas Fulton, explained that the zone grew from various origins for varied reasons.[2] He pointed out that some modern territorial seas are the shrunken remnants of earlier extended claims, while others are strictly of recent origin, having no connection with earlier,

broad claims.[3] As to the actual legal character of the territorial sea, Colombos wrote in 1967, "There is an embarrassing abundance of contradictory opinions of text writers, an almost complete absence of case law and a varying and conflicting practice by States (meaning "nations") on this subject (the legal nature of the territorial sea)."[4]

This paper will first trace the historical and legal development of the territorial sea zone and point out how it relates to the numerous other jurisdictional claims made to the coastal waters of a nation. This will shed some light on the somewhat imprecise function of the territorial sea. Second, the paper will investigate the potential effects on federal-state and the surprising possible impact on state-state relations which could result from changing the width of the United States territorial sea from 3 miles to 12 miles.[5]

II. HISTORICAL DEVELOPMENT OF THE TERRITORIAL SEA

A. Open Sea and Closed Sea Concepts

The term "territorial sea" itself can be traced back to 1357 (in its Latin form, "territorio mari"), and at that time, it was used to describe a 100-mile reach out into the ocean for a combination of defense, customs, and criminal jurisdictions.[6]

The history of the territorial sea can best be outlined by following the fluctuations of the "open sea/closed sea" concept. The terms "open sea" and "closed sea" refer to countervailing views on ocean use. Under the open sea concept, the oceans are

considered to be available to all users for almost any purpose. "Closed sea" refers to those ocean areas controlled in some way by a nation or a people. For example, one of the early users of the ocean, the Romans, vacillated between claiming control of sections of the Mediterranean (closed sea approach) or asserting an unclaimable sea (mare liberum--free or open sea).[7] Later, during the middle ages, smaller Adriatic powers such as the Duchy of Venice practiced a closed sea policy by claiming jurisdiction in near-lying regional seas in order to control trade, to exact tolls from passing ships, and to exclude unwanted vessels.[8] To the seaward of Venice's claim, of course, the ocean was considered "open." The Danes pursued a closed sea approach throughout a good deal of their history by actively asserting control over nearby ocean regions.[9] However, perhaps the most extreme closed-sea position was a series of claims by Spain and Portugal beginning in 1493. The claims initially attempted to divide only the New World between Spain and Portugal. The Pope at the time drew a line of demarcation, and on the basis of that line, these two nations eventually claimed control over most of the oceans of the world.[10]

One of the most succinct assertions of the open sea policy came almost a century later, in 1580, from Queen Elizabeth I in response to Spanish complaints about Sir Francis Drake's voyages in "Spanish" oceans. Because the English had broken with Rome and because they were a strong maritime power, they had little respect for the papal division of the world. As Queen Elizabeth pointed out: "the use of the sea and air is common to all;

neither can any title to the ocean belong to any people or private man, for as much as neither nature nor regard of the public use permitteth any possession thereof."[11]

The most telling battle in the open-versus-closed-sea debate was commenced by a Dutchman, Hugo Grotius, who wrote a small article called Mare Liberum (free or open sea) in 1609, which appeared later as a chapter of his book De Jure Praedae (on the Law of Booty). The key point was: the ocean cannot be property of any one nation because it is against nature to appropriate what is inexhaustible and can be used by everyone. However, many jurists at the time assumed that national claims to ocean areas were appropriate and that Spain and Portugal had simply excelled in the practice, by claiming the vast majority of the world's oceans. Other powers functionally disregarded these claims when necessary, yet it was disconcerting to have some legal backing in favor of these extravagant pretentions. Therefore, Grotius' positions held a strong appeal to nations seeking to counter the Spanish and Portuguese assertions. His publication has come to be considered the beacon which guided the advancement of the open sea doctrine.[12]

The person generally considered to lead the closed-sea opposition to this view was an Englishman, John Selden, who wrote 26 years later in 1635 and who advocated regional claims by England to its surrounding seas.[13]

In spite of the closed sea efforts, a consensus began to form along the lines of Grotius' open sea theory. It should be mentioned that even Grotius conceded that there could be limited

sovereignty over bays, straits, and the like, but that this should not interfere with free passage on the ocean.[14] The essence of the discussion was not so much whether there should be a closed sea or not, but how far out it should reach.

B. Purposes for Establishing a Territorial Sea

The purposes for claiming some sort of territorial sea varied widely. Reasons ranged from control over coastal fisheries, one of the most important purposes,[15] to the control of trade, the prevention of competition, or the collection of tribute.[16] Territorial seas were sometimes used by colonial powers to control the trade with the colonies.[17] For the United States, the first reason for making an open claim to a territorial sea was to protect the young nation's neutrality amid the hostilities in progress among the British, French, and Spanish.[18] These claims to authority over marginal seas were inextricably connected to the question of the distance this authority reached.

C. Historical Differences Concerning the Width of the Territorial Sea

The question of the width of the territorial sea was unresolved up into modern times. Even in the beginning, claims varied widely. For example, Italian claims first went to 100 miles,[19] but later, were reduced to 60 miles.[20] In 1023, Knut, the Scandinavian king of England, had established a midline (Thalweg) between France and England, to delineate the boundaries for claiming derelict ships.[21] Later in 1585, Elizabeth I of England specifically disavowed the midline principle in a dispute

with Denmark[22], a seafaring nation which was using the method to claim the entire sea between Denmark and Norway and between Norway and Iceland. The affected ocean regions almost bordered on the home waters of England, so the British were vehemently opposed to this practice.[23]

In the 17th and 18th centuries, the cannon-shot rule provided controlled coastal zones for purposes of neutrality. Contrary to modern understanding, this rule did not originally describe a measurement for the width of the territorial sea belt. Instead, it described a semi-circular zone of neutrality around a non-belligerent port.[24] In the event that one ship was being pursued by another, the fleeing ship might take refuge within a port of a third, non-belligerent, nation. The pursuer respected the neutrality of the refuge port and would not attack the pursued ship in that port. The cannon-shot zone was the semi-circular zone surveyed by the port's shore batteries and the persuasive effect of the guns no doubt encouraged the pursuing ship to exercise such restraint. [25]

The Danish practice relating to ocean claims influenced the change from the semi-circular to the belt configuration. The broad claims of the Scandinavians to a regional sea steadily shrank under pressure from other European powers wanting an open sea practice. Finally the Danes firmly froze their claim at 4 miles from shore--along the entire coast line.[26] This served as precedent for the uniform and precisely limited territorial belt configuration. An Italian diplomat further encouraged the belt arrangement when he suggested that the cannon-shot distance be

considered to be 3 miles and that that distance be used all along the coast, not just where the guns were located.[27] In 1800 and 1801, in the Twee Gebroeders cases, the British judge, Lord Stowell, identified the cannon-shot distance with the 3-mile distance and ruled that such was the width of the territorial sea.[28] He held to this ruling 5 years later in The Anna.[29]

Even though tied to the boundary of a coastal nation, international law is the arena in which the territorial sea is given legitimacy because the value of such a zone is in its observance by other nations. An agreement between nations has the force of law either because it is written down in a formal treaty or because a mutually acceptable practice has evolved into an international custom. Justice Stone succinctly summarizes customary international law in Sears v. The Scotia as "a generally accepted rule of conduct."[30] The custom becomes binding because, as Justice Stone put it, "(the practice is) accepted and assented to as a wise and desirable system. . ."[31] The conduct is binding after it becomes an accepted general practice by many nations with no significant opposition.

However, despite strong assertions to the contrary, opinion has not been unanimously in favor of the 3-mile distance even though 3 miles was the claim favored by the dominant powers in the 18th and the early part of the 20th century.[32] Some writers considered the 3-mile limit to be established customary law,[33] but there is strong information to the contrary.[34] Spain continually claimed a 6-mile territorial limit[35]; the three major Scandinavian countries claimed 4 miles [36]; Russia claimed 19 or

30 (depending on the coast) for purposes including self defense[37]; Portugal claimed beyond 3 miles but could not enforce it against English pressure[38]. In accordance with such diversity, other authors took the opposite view, saying the breadth of the territorial sea was unsettled.[39] Attempts in 1930 to establish uniformity of breadth were dashed on the rocks of disagreement. A conference was called under the auspices of the League of Nations to codify international law, including that pertaining to ocean law.[40]

> With respect to the work of the Conference on the territorial sea, two principles secured unanimous assent: namely, that every coastal nation was entitled to sovereignty over a belt of water touching its shores and that the coastal nation should put no obstacles in the way of innocent passage for navigation by the vessels of all nations in the territorial sea. <u>But there was no agreement on the width of the territorial sea</u>. Some nations felt that no uniform distance should be fixed for jurisdiction over all matters for all countries, given the different kinds of control required by countries with different geographical, security, or economic conditions.(emphasis added)[41]

Twenty of the 47 nations attending the conference (including the nations with the greatest shipping tonnage), favored the 3-mile width; 12 favored a 6-mile breadth, and the 4 Scandinavian countries supported a 4-mile belt.[42] The next major international effort to clarify territorial sea boundaries occurred in 1958. Under United Nations sponsorship, the participating nations drew up a treaty on the Convention of the Territorial Sea and the Contiguous Zone (CTSCZ)[43] but could not specify a fixed limit because of disagreement as to the proper distance. Some writers reiterated the position that since the 3-mile width was the claim most frequently insisted upon in the

international community, that distance was confirmed under international law.[44] However, this amounts to an arbitrary dismissal of the diverse claims made by several nations. In addition to Scandinavian claims out to 4 miles and the Spanish claim to 6, 15 other nations claimed 12 miles or more at that time.[45] Agreement continued to escape the sea-going community

In any case, by 1971, the 3-mile distance was a minority position. By then, a majority of coastal nations had claimed a territorial sea broader than 3 miles.[46] Eventually three miles ceased to be even a potential point of discussion. Today, an overwhelming majority of coastal nations claim 12 miles.[47] This trend is confirmed in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which codifies the 12-mile limit as the maximum width of the territorial sea.[48] Acceptance of the treaty, and the 12-mile territorial sea practice, by a large majority of the nations of the world would increase the pressure on the United States to adopt a similar extended territorial sea.[49]

D. Authority Asserted in the Territorial Sea

The authority exercised historically in the territorial sea has been diverse, to say the least. The quote by Colombos given earlier speaks to this.[50] Claims to a coastal zone originated to serve many different purposes. England may have had a clear understanding of the 3-mile territorial sea as distinct from the 5-mile custom zone, but other nations seemed to have simply claimed the right to exercise authority out into the ocean

without distinguishing among the various types of authority possible.[51] The Report of the Special Master in United States v. Maine,[52] states that the English claim to a territorial sea did not contemplate any property right assertions until the 20th century.[53] The territorial sea was a jurisdiction of varying geographic range and, sometimes, varying authority.

Several sources hold that the sovereignty within the territorial sea equates to that exercised on the land territory of a nation.[54] And this seems to be the meaning of article 1 of the Convention on the Territorial Sea and the Contiguous Zone.(CTSCZ)[55] However, this would seem to be a bit analagous to saying that, except for an easement across this border strip on a plot of land, the landowner exercises the same control over that strip as she does over the rest of her land. If the easement marks the location of a public highway, the small exception would be very significant. Innocent passage, and now transit passage, represent a serious diminishment of sovereign control. Additionally, the law related to international straits effectively nullifies much of the sovereign control of the strait state.[56] No coastal nation may set up a territorial sea claim which cuts off another nation from the high seas.[57] Moreover, international law mandates that the coastal nation publish notice of navigational hazards for general information.[58] Criminal jurisdiction of the coastal nation does not usually apply on board a foreign ship.[59] Nor does civil jurisdiction apply at all times to a foreign ship while it is under way.[60] These erosions of national control would never be "tolerated" within

land boundaries. Certainly, there is considerable national sovereignty over the territorial sea zone, most coastal nations could regain full control by brute force. But, according to the reading of the law, sovereignty is significantly eroded.

The exercise of authority in the territorial sea depends both on relatively clear standards of international law and also on the subjective and shifting policies of the coastal nation. Theoretically, international law sets the perimeters of the rights to be exercised, as exemplified by the Convention on the Territorial Sea, etc. (CTSCZ).[61] Among other things, this convention outlined the law regarding the innocent passage of merchant ships and warships through the territorial waters.[62] Yet "innocent passage" can have different interpretations, depending on "the flag the vessel is flying, the cargo it is carrying, its means of propulsion, or its destination."[63] Here, the subjective national policies come into play. It has been said that the United States and the Soviet Union are nations which exercise almost complete authority over all shipping within their territorial waters, in spite of the wording of the CTSCZ.[64] However, the official United States position states that there is no limitation on the innocent passage of foreign merchant ships or warships in the American territorial sea; nor does the United States accept any limitation on innocent passage for U.S. vessels in the territorial seas of other nations.[65]

Besides variation in the control of shipping, the application of civil law jurisdiction within the territorial seas varies from nation to nation. For example, a marriage on

shipboard lying within the territorial waters may or may not be under the jurisdiction of the coastal nation.[66] A birth on board such a ship in British waters would not bring British citizenship to the infant, though it would if the birth took place on British soil.[67] French law specifically considers a birth in French territorial waters to be a birth in France.[68] No distinction between birth in the territorial sea and on land is found in United States law.[69]

E. National Jurisdiction Reaching Beyond the Territorial Sea

Early in the history of international law, ocean claims were often expansive and irregular because they were designed to accommodate trade, fishing, customs, or security needs which did not follow a narrow belt pattern.[70] As the coastal nations were persuaded to reduce their claims to a territorial sea, they nevertheless insisted on limited jurisdiction beyond the territorial sea for certain needs, such as control over fishing or smuggling.[71] Thus, the territorial sea as an international law concept never did function as the final boundary of the sovereignty of a nation. The territorial sea was only part of an assemblage of coastal jurisdictions.

There is a description of real estate rights in English Common Law which compares land ownership rights to a bundle of sticks. "Ownership" of land is likened to the ownership of the sticks in the bundle. Rarely does one own all the sticks; easements, zoning regulations, and contractual stipulations place some of the sticks (rights) in other hands. Similarly, one can

envision a bundle of sticks (rights of national sovereignty) in the coastal waters. Here too, almost no nation retains all the sticks in the bundle due to international commitments. A coastal nation retains most of the sticks of the sovereignty bundle within the territorial sea. However, the bundle of sticks is smaller in the contiguous zone, smaller yet in the exclusive economic zone, and reduced to a very few sticks on the high seas.

In this way, the degree of sovereignty rights decrease in the zones lying farther out from the shore. Unfortunately, when one considers all types of jurisdictions in the coastal oceans, the zones do not form an orderly progression of contiguous belts. Overlap is the rule, not the exception. The publication, Limits in the Sea, put out by the U.S. Office of the Geographer, lists several types of coastal zones which the Geographer monitors. The list includes (1) the territorial sea, (2) the contiguous zone, (3) a pollution zone, (4) a security zone, (5) a fishery zone, (6) the continental shelf, and (7) the economic zone.[72] Off the United States coast, there are also state and federal divisions,[73] as well as national defensive sea areas.[74] Three miles, 12 miles, and 200 miles may mark the boundaries of the territorial seas, the contiguous zones and the fishery zones, respectively, but those distances may be completely irrelevant to other coastal zones. The specific needs of a given coastal nation generally determine what authority is claimed and where.

One early example of specific legal claims to limited jurisdiction beyond the territorial sea was a series of English laws called the "Hovering Acts," first enacted in 1736. The laws

applied out 5 miles to reach smuggler craft "hovering" just beyond the territorial sea.[75] These laws were mentioned in 1804 by Chief Justice John Marshall of the United States Supreme Court in Church v. Hubbart.[76] Marshall also referred to extra-territorial authority claimed by the United States to send revenue cutters--ships used for customs law enforcement--out to a distance of 12 miles.[77] Many nations claimed such special-purpose jurisdiction beyond their own territorial sea.[78]

Another jurisdiction--that over living ocean resources--also extended beyond territorial sea claims. An 1821 example was the Russian claim to a 100-mile zone off her Asian and American territories from which she excluded foreign fishing. In 1893 Russia prohibited foreigners from hunting seal in a zone ranging from 10 to 30 miles of her coast.[79]

In recent years one of the most extreme examples of special purpose jurisdiction came from the American President, Harry S. Truman. In two proclamations in 1945, he claimed exclusive American jurisdiction over minerals on the continental shelf and over some of the fisheries contiguous to the territorial sea.[80] This was a radical reversal of American policy. Before this, the United States had consistently argued for a very narrow territorial sea. Even though this was not an extension of the territorial sea per se, the reach, as well as the extent, of the claim out onto the high seas was without recent precedent.[81]

Following Truman's lead, several South American nations extended claims of varying types of jurisdiction (including territorial sea jurisdiction) out to 200 miles.[82] These expanded

claims precipitated world-wide re-thinking of the limits of coastal nations' authority in coastal waters. Creeping jurisdictions extended the zones of control claimed by coastal nations, making it difficult to identify a uniform pattern of either boundaries or laws. This confusion was satisfactory to no one, including the United States.[83] The most recent attempt by the international community to coordinate the patchwork of international ocean law was the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[84] A very brief summary of the international efforts to clarify ocean law will help provide background for the later parts of the paper.

F. United Nations Convention on the Law of the Sea

It was to organize, standardize, and constrain this uncoordinated multiplication of coastal zones that the international community met several times during this century.[85] The League of Nations supported the concept of a uniform territorial sea, but it was never successful in formally delineating the dimensions of that zone.[86]

In 1958, the first United Nations conference, UNCLOS I, convened. It produced: 1. the Convention of the Territorial Sea and the Contiguous Zone (CTSCZ)[87]; 2. the Convention of the High Seas[88]; 3. the Convention on Fishing and Conservation of the Living Resources of the High Seas[89]; and 4. the Convention on the Continental Shelf.[90] However, in spite of the fact that the CTSCZ (no. 1 above) specifically organized the territorial sea

law, the conference delegates were not able to agree upon a uniform width to that particular coastal zone.

A second UN-sponsored conference, UNCLOS II, convened in 1960 to settle on the width of the territorial sea, yet soon disbanded without significant accomplishment.[91] However, the U.N. General Assembly continued to be concerned with the peaceful use of the sea-bed and its resources and, by resolution, urged a third attempt--UNCLOS III.[92]

UNCLOS III was initiated in 1970 to create a comprehensive body of ocean law. This task was finally accomplished 12 years later on April 30, 1982. One hundred thirty nations voted for the convention; 4 nations (including the United States) voted against it; and 17 nations abstained.[93] As of August, 1983, 130 of the 157 nations in the United Nations have signed the convention.[94] This treaty must be ratified by at least 60 nations before it will come into force.[95]

This United Nations Law of the sea treaty is significant because it organized what had been confused international ocean law. Ocean zones established by the treaty and the degree of control which can be exercised by the coastal nations have uniform ranges for all the nations which accept the treaty.[96] These zones are: the territorial sea, which can extend out to 12 miles from shore and within which the sovereignty of the nation applies to the air, sea, and seabed;[97] the contiguous zone, which can extend out an additional 12 miles to 24 miles from shore to accommodate the coastal nation's customs, fiscal, immigration, and sanitary control needs;[98] and the exclusive economic zone

(EEZ) which reaches out 200 miles from shore and within which the coastal nation controls the living and non-living resources in the water and on the seabed.[99]

The treaty process of the UNCLOS codification of international ocean law has influenced the actions and decisions of many nations even though it is not yet in force. For example, almost all of the claims to a 200-mile exclusive economic zone have been made since 1974, when such a zone was proposed for consideration at UNCLOS III.[100]

The relative simplicity and the potential uniformity of the zoning system for coastal ocean regions contrasts with the inconsistent collection of coastal nation jurisdictions which had previously evolved through traditional international law. In spite of the United States' opposition to the seabed and dispute settlement provisions of UNCLOS, the United States has accepted a majority of its provisions.[101] It is not unconceivable that the United States may join the majority practice of adopting a 12 mile territorial sea.

III. UNITED STATES PRACTICE

A. Purpose of the Territorial Sea

In 1793, the new American nation provisionally adopted a 3-mile limit for purposes of neutrality.[102] France and England were at war again and each was watching to see whom the United States would help. The United States, wanting uninterrupted trade with the Caribbean possessions and with the mainland of

both powers, opted to take a neutral position. To this end, the U.S. Secretary of State, Thomas Jefferson, wrote to both the British and the French ministers informing them of the 3-mile neutrality claim of the United States.[103] Neither power was to carry on hostile acts against the other within the territorial waters of the United States. Congress confirmed the non-involvement position by passing the "Neutrality Act"[104] in 1794. The act excluded hostile action by other nations against each other within the United States territorial sea.

Chief Justice Marshall explicitly referred to the multiple purposes for this extra-territorial jurisdiction in Church v. Hubbart.[105] He indicated that within the territorial sea, the coastal nation had the same absolute sovereignty as it had on land.[106] In addition, he went on to affirm the permissibility of a nation exercising specified, but limited, authority farther out.[107]

The United States asserted the buffer function of the territorial sea during the unsettled times prior to World War II.[108] However, the long range of modern war weapons invalidates any serious claim to a buffer function by such a thin belt of ocean jurisdiction. American defense thinking in recent times has emphasized the need for U.S. military (and commercial) shipping to approach to within 3 miles of other nations, especially in order to pass through narrow, but important, international straits and archipelagic waters.[109]

B. Width of the Territorial Sea

At the time of the American separation from England in 1776, the 3-mile rule was on the verge of coalescing into a recognized practice by the international community.[110] In 1781, the legislative branch of the new American government obliquely acknowledged the 3-mile distance by passing a law authorizing the capture of foreign ships, for cause, within 3 miles of shore.[111] Then due to the fracas among France, England, and Spain, mentioned above, Congress included the 3-mile limit in coastal legislation when it passed the Neutrality Act in 1794, at the request of President Washington. The act proscribed hostile action by other nations within 3 miles (1 league) of United States shore and authorized the jurisdiction of federal courts out to 3 miles for complaints relating to ship capture.[112]

The executive branch also followed the 3 mile rule in 1793, when Secretary of State Thomas Jefferson wrote the note discussed above to the French minister.[113]

> [T]he greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one league.[114]

The judicial branch of the government, in the person of Chief Justice Marshall, joined the other 2 branches in adopting a 3-mile wide territorial sea in 1804 in Church v. Hubbart. This case dealt with the Portuguese control in the 3-mile territorial sea off Brazil. Marshall affirmed the sovereignty of a nation "within the range of its cannon."[115]

The United States has been one of the most consistent adherents to the 3-mile limit, for the territorial sea proper, since 1793.[116] In 1922, Cunard V. Mellon discussed the fact that the U.S. remained faithful to a 3-mile proposition throughout the 19th and into the 20th centuries.[117] This was again confirmed in the 1947 case of United States v. California, and most recently in 1984 in Secretary of the Interior v. California.[118] Throughout negotiations with other nations, the United States insisted on 3 (nautical) miles as the international standard.[119]

C. Authority Asserted in the Territorial Sea

Even after a nation establishes a territorial sea, there is a need to ask, What is the extent of sovereignty exerted in this zone? As mentioned before, Chief Justice John Marshall said that the sovereignty in the territorial sea is as absolute as that on land.[120] However, "innocent passage" reduces the sovereignty in the territorial sea,[121] whereas no such imposition is allowed on land. Furthermore, the coastal nation's criminal jurisdiction over actions on board foreign vessels is much more limited than it is on dry land.[122] An examination of some applications of authority in the United States territorial sea can show the extent and the limits of power exercised in this zone. This examination will demonstrate one of the principal themes of this paper: There is surprisingly little authority which, in United States practice, belongs exclusively to the territorial sea.

1. Fishing

Even though access to fishing grounds played a role in the early thoughts on the territorial sea,[123] Congress seems to have

ignored the fishery regulation within the territorial sea throughout most of the 1800's. Generally, control over fishing was left to the states,[124] though in 1890 the Supreme Court stressed that this state control was subject to federal predominance.[125] In any case, the role of the federal government up to that time seemed limited to negotiating and enforcing fishery treaties with other nations.[126]

However, in 1871, Congress did increase federal involvement in fishery management by establishing the Bureau of Fisheries to investigate possible diminution of food fish stocks in the United States.[127] Prior to 1945, American control over fishing reached out only 3 miles. It was in 1945 that one of President Truman's proclamations extended fishery conservation jurisdiction out onto some parts of the high seas.[128] Nevertheless, in spite of the intent of the 1945 proclamation, no legislation carried out that claim for decades. In 1964, Congress passed the Bartlett Act[129] regulating fishing by non-U.S. fishermen within the territorial sea. This fishery regulation exemplified the rare occasion when national authority was specifically focused in the territorial sea.[130] However, just two years later, Congress extended the fishery control jurisdiction beyond the 3-mile limit, once again robbing this historically unique zone of a specific role. Thus, the 1945 Truman Proclamation on fisheries saw its first concrete legal expression in 1966. Ten years later, in 1976, United States jurisdiction over fisheries took another leap when Congress moved the boundary for exclusive fishery control out from 12 to 200 miles[131] far beyond the territorial sea.

2. Security

Early in U.S. history, the territorial sea served a security function by providing a neutrality zone around America to prevent unintentional entanglement in war.[132] However, neutrality faded as a concern as America grew stronger and as the European Powers withdrew from the Western Hemisphere. But this function was re-emerged during the early part of World War II when Roosevelt used the territorial sea as a buffer zone to keep the United States out of the conflict among the European belligerents.[133] As mentioned in section A, above, modern weapons of warfare have reduced the value of a security zone a mere 3 miles in width. However, since the coastal nation still places in the territorial sea many of the sticks in the bundle which makes up its national sovereign authority, that nation can exclude unfriendly ships which are not engaged in mere innocent passage. Yet ironically, since 1958, the Convention on the Territorial Sea and the Contiguous Zone (CTSCZ) has formalized the traditional requirement that coastal nations must permit innocent passage[134] for all ships, including warships.[135] Articles 14, 15 and 23 of the CTSCZ,[136] indicate that coastal nations may not hinder innocent passage through the territorial sea even of warships, and the United States supports this position.[137] Thus, even foreign warships which are not behaving in a hostile manner are defined as "innocent." This represents no little imposition on the sovereignty theoretically invested in the territorial sea.

In 1918, the United States announced it would exercise the right to establish "defensive sea areas" from which navigation could be fully excluded in time of peace or war.[138] Since 1958, article 16(3) of 1958 Convention on the Territorial Sea and the Contiguous Zone[139] permits this defensive sea area, but only for limited time and limited areas. Straits and sea lanes used internationally may not be closed even temporarily. However, this form of control is not limited to the territorial zone. Therefore, this control is a security practice technically unrelated to the territorial sea.

3. Pollution

Another of the powers exercised in the territorial sea in United States practice since the early years of the republic has been the power to control pollution.[140] However, this authority seems to have been based, not on a national territorial sea jurisdiction but on the police power of the coastal states to prevent damage. These coastal states saw a clear need to preserve their water quality (usually to protect a local fishery) and, on that basis, made the jurisdictional claim. It should be stressed that this was originally an exercise of state, not national, authority. Later, pollution came to be recognized in the United States as a concern deserving national attention. One of the most significant ways that the national government dealt with pollution control in international law was by participation in the Convention on the Territorial Sea and the Contiguous Zone (CTSCZ).[141] In this treaty, pollution control is permitted up to 9 miles beyond the territorial sea in the contiguous zone

reaching out to 12 miles.[142] In this zone, the coastal nation can exercise customs and sanitation control. Here too, a jurisdiction originally related to the territorial sea oozed out into a more seaward zone. Federal law, through the Federal Water Pollution Control Act, controls all dumping by U.S. citizens into any part of the ocean.[143]

4. Minerals

At the same time that Truman claimed authority over some extraterritorial fisheries, he also claimed authority over the exploitation of minerals out to the edge of the continental shelf.[144] However, years passed before any legislative action implemented this. The 1947 Supreme Court decision, United States v. California, referred to the recent history of mineral exploration in the coastal waters[145] and mentioned that the technology of those early days of oil development could not reach much of the minerals on the sea bed, and therefore, the history of mineral development was brief[146] and the laws governing such exploitation were few. It wasn't until 6 years after the Court made this observation that Congress passed the first significant federal laws concerning ocean mineral exploitation, the 1953 Submerged Lands Act (SLA)[147] and the Outer Continental Shelf Lands Act (OCSLA).[148] The SLA gave the states mineral control in the 3-mile territorial sea, while the OCSLA, on the other hand, gave the federal government control over mineral exploitation beyond the 3-mile limit, out to the edge of the continental shelf. More will be said about these laws later.

5. Civil and Criminal Jurisdiction

With respect to jurisdiction over United States citizens, the territorial sea is irrelevant. Several cases have established that states within the United States have jurisdiction over their own citizens for criminal matters even out onto the high seas, if the crime affects the state.[149] And federal criminal jurisdiction over United States citizens or U.S. registered ships likewise extends, by federal statute, out on to the high seas[150] because those parties are subjects of United States authority already.[157] Otherwise, U.S. laws were to stop at the 3-mile limit, or, in customs and sanitation matters, at 12 miles.[152]

In 1953, the OCSLA extended U.S. criminal and civil jurisdiction out to the "subsoil and seabed of the outer Continental Shelf and added that, ..." (t)o the extent that (the state laws) are ... not inconsistent with federal laws ... the civil and criminal laws of each adjacent (coastal) state ... are declared to be the law of the United States for that portion of the subsoil and the seabed of the outer Continental Shelf ...."[153] In addition, the OCSLA extended federal customs jurisdiction out 200 miles on either the seabed itself or on any structure attached to the seabed.[154] In theory, though, these laws applied only to any person on a boat or structure connected to the ocean bottom, such as an oil rig. The courts have shown remarkable flexibility, however, in applying U.S. law out to indeterminate distances. In 1965, a court acknowledged the narrow width of the territorial sea but nevertheless allowed an

insurance policy owner to recover for a boat accident 3.6 miles from shore. The court reasoned that the policy was valid within the jurisdiction of the United States and, after the 1953 OCSLA, U.S. jurisdiction extended out to the edge of the Continental Shelf.[155]

A Texas court wasn't so generous with jurisdiction in 1966. The court denied recovery for a plane crash 21 miles from shore saying that the OCSLA applied jurisdiction only to the seabed and artificial structures thereon.[156] However, the Texas court did mention, and an Alaskan court based a decision on, the legality of a state maintaining jurisdiction well beyond the 3-mile limit over its own residents or those connected in some way to the state.[157]

Criminal jurisdiction over foreigners would seem to be controlled by the CTSCZ which forbids the coastal state to exercise criminal jurisdiction beyond the territorial limit[158]. However, such jurisdiction in customs matters has been interpreted by the courts to be so elastic and unfettered by territorial or contiguous zone boundaries that it is difficult to determine precisely what role courts assign to either the territorial sea or the contiguous zone in relation to such jurisdiction. Federal law extends criminal jurisdiction over parties already under the jurisdiction of the United States (U.S. citizens or U.S. registered ships) out on to the high seas.[159] However, such jurisdiction has been found by courts to apply to non-U.S. citizens and to such non-citizens without the usual minimum contacts with this country. In United States v. Postal,

for example, the Supreme Court upheld the arrest of an alien drug smuggler off the Florida coast even though the Coast Guard waited until the boat had sailed beyond the 12-mile limit of the contiguous zone set by the CTSCZ for such customs matters.[160] The court held that this violation of the treaty did not invalidate the arrest.[161] In another ruling the same year, United States v. Rubies, a federal court recognized significant jurisdictional authority far beyond the custom zones by upholding the arrest of a drug smuggler who never did come within 12 miles of shore and was arrested more than 50 miles out. Oddly, the court relied on the fact that the boat belonged to no nation and thus could not claim protection under a treaty between nations.[162] The district court further asserted that the Coast Guard could search and seize any vessel under U.S. jurisdiction, for cause.[163] Such jurisdiction, referred to in 14 U.S.C. 89(a), exists where the authorities are either (1) making a routine document or safety inspection or (2) where there is almost any suspicion of a crime.[164]

The upshot of all this is to functionally disregard the territorial sea as a significant zone of criminal or civil jurisdiction concerning U.S. nationals.

6. Exclusive Economic Zone (EEZ)

The most recent United States expansion of jurisdiction previously related to the territorial sea occurred on March 10, 1983. President Reagan followed the pattern established by the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and proclaimed an "Exclusive Economic Zone" extending out to the

200-mile limit "assert(ing) certain sovereign rights over natural resources and related jurisdiction" which includes jurisdiction over both living and non-living resources.[165] This distant reach of national jurisdiction might be said to be the most recent result of the Truman mineral proclamation of 1947. In any case, this extension of jurisdiction leaves the territorial sea far behind.

IV. STATUS OF THE TERRITORIAL SEA

The territorial sea permits the exercise of the sovereignty of a coastal nation out into the ocean. Historically, assertions of sovereign control over the sea have gone from no significant assertions of authority over coastal oceans to claims over huge portions of the oceans. The extent of claims appeared to settle down to a relatively narrow zone by the early part of the 20th century. However, while the "territorial sea" itself has remained rather narrow, many specific rights and powers initially associated with this territorial zone, have later been extended beyond that belt by the coastal nations. While the territorial sea is not thereby drained of authority by this development, the importance of the United States territorial sea as such is necessarily blurred. Powers, which historically were limited to the territorial 3-mile limit, seem to have "leaked" farther out into the ocean. All that can be said with imprecise certainty is that the territorial sea in United States practice is the zone allowing the greatest exercise of sovereignty of any of the several coastal zones.

As stated, the U.S. maintains a 3-mile territorial sea while international practice in this century, both under traditional international law mechanisms, and under the 1982 United Nations Law of the Sea treaty, permits a wider territorial zone. The second part of this article will examine the domestic effect on U.S. federal-state and state-state relations in the event that the U.S. were to extend the width of its territorial sea from 3 to 12 miles.

V. ALTERING THE TERRITORIAL SEA BOUNDARY

It would seem that altering the national boundary along the entire ocean border of a nation would inescapably create shock waves in the national framework. That may well be the result of such a change, but, surprisingly, it is not the inevitable result. After outlining the relative roles of federal and state governments in the ocean zones off the United States coast, the discussion will cover 2 possible scenarios. In the first scenario, the national territorial sea boundary would move out to 12 miles from shore, but the state boundaries would remain at their present 3-mile limit.[166] In the second scenario, both the national territorial boundary and the state marine boundary would shift out to 12 miles. The 2 scenarios lead to very different domestic results.

A. History

For the first 171 years of our federal system (until 1947) the seabed of the territorial sea was considered to be the bailiwick of the coastal states. The leading inland water case,

Pollard's Lessee v. Hagan[167], which drew from Martin v. Waddell[168] seemed to place the lands submerged under the coastal ocean into state ownership.

> [W]hen the Revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use subject only to the rights surrendered by the Constitution to the central government.[169]

This case line wound its way through many subsequent court decisions related to control over the sea bottom beyond the low water mark.[170] The states exercised control and even invested heavily in these areas indicating a clear belief that they owned the lands in fee simple.[171] In fact, in 1933, Secretary of Interior, Harold L. Ickes, refused to regulate oil drilling off the California coast saying, "Title to the soil under the ocean within the 3-mile limit is in the State of California and the land may not be appropriated except by the authority of (that) state."[172]

However, by 1945 the federal government had changed its view and decided that it did have an interest in the oil profits coming from that 3-mile belt. Therefore, the Attorney General of the United States, Thomas Clarke, went to court to challenge California's right to regulate the leasing of oil wells in those coastal waters. When the case finally emerged from the Supreme Court in United States v. California,[173] the decision established that the federal government, not the states, had the paramount rights in the territorial sea.[174] The Supreme Court undid in that one decision, what had been the assumed balance of state and federal roles for more than a 170 years.[175]

Congress reacted with a howl that reverberated until 1953. Even before the U.S. v. California decision, Congress had been trying to clarify state ownership of the territorial sea by means of a joint resolution in 1946, granting the lands underlying the 3-mile territorial sea to the states[176]. But Truman had vetoed the resolution. And in 1952, 5 years after the Supreme Court's 1947 decision, Truman vetoed another resolution of similar intent.[177] After this second veto the congressional pressure sharpened, and in 1953, Congress finally passed the Submerged Lands Act (SLA).[178] The SLA gave the seabed and the overlying waters out to 3 miles to the coastal states. A report from the House Judiciary Committee said of the Submerged Lands Act:

> [The law] merely fixes as the law of the land that which, throughout our history prior to the Supreme Court decision in the California case in 1947, was generally believed and accepted to be the law of the land; namely, that the respective states are the sovereign owners of the land beneath navigable waters within their boundaries and of the natural resources within such lands and waters.[179]

The same year, Congress passed a companion law to the Submerged Lands Act (SLA), the Outer Continental Shelf Lands Act (OCSLA),[180] which reaffirmed the federal control of the seabed beyond the 3-mile limit, out to the edge of the continental shelf. These 2 related 1953 laws would appear to have finally set up a tidy disposition of the seabed under coastal waters: from 0 to 3 miles, the states were to control the resources, but from 3 miles out to the edge of the continental shelf the federal government was to manage.

The wording of the Submerged Lands Act (SLA) put the title and ownership of the lands beneath the 3-mile territorial sea,[181]

and all the natural resources, (mineral and living, those on and under the seabed, and those in the overlying waters) into the control of the states.[182] The SLA specifically granted the states the right to manage, administer, lease, develop, and use these lands and natural resources.[183] Congress enumerated the powers retained by the federal government, including the authority over navigation, flood control, and the production of power;[184] over commerce, national defense, and international affairs.[185] This federal authority is paramount, but

> ... shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective states ... by ... this title."[186]

In other words, it appeared that the federal government was not to manage, control, or supervise the resources in the 3-mile state coastal waters. Federal intervention seemed to be limited, by the SLA, to commerce control, national security, navigation and international affairs. Out to a distance of 3 miles, the coastal states were to own the real estate. That would seem to be a reasonable interpretation of "sovereign ownership"[187] and "proprietary rights of ownership"[188] accorded to the states. However, in Zabel v. Tabb,[189] the 5th Circuit ruled against landowners who contended that the federal government had given up the right to regulate tideland property within the state limits. The court said that the federal government did not loose all of its commerce powers just because it had given up all commerce

powers not specifically reserved in the wording of the OCSLA or SLA.[190]

B. State Claims Beyond 3 Miles

In 1950, before the SLA was passed, the Supreme Court had denied claims by Louisiana and Texas [191] to a territorial sea broader than 3 miles. However, upon passage of the SLA, the debate over state claims in the Gulf of Mexico erupted anew. It was based on state claims, mentioned in §1312 of the SLA, referring to the possibility of a state claiming more than 3 miles as its share of submerged lands.[192] All 5 Gulf states went to court to show a historical claim which would allow those states to claim a wider SLA region and the resources therein.[193] The Supreme Court accepted the Texas claim out to 9 miles;[194] rejected the claims of Louisiana, Mississippi, and Alabama seaward of the 3-mile limit;[195] and accepted Florida's claim to a 9-mile SLA area, but only to that area off the Gulf coast.[196]

The variation of state jurisdictions creates interesting situations. Texas and Florida are able to gain oil and gas income from broader reaches than their sister states on the American coasts, and the territorial waters of these 2 states actually exceed the national territorial waters claimed by the United States under international law.[197] But these anomalies, disposed of by the Supreme Court[198] do not form the target of our examination of a territorial limit change.

Recapitulating: The 1947 decision initiated a series of events which reversed the position of the law several times. Historically, the states had been exercising control of the

territorial sea; then in 1947, the Supreme Court put up a "no trespassing" sign; and subsequently, in 1953, Congress "gave the land back" to the states. Later, in 1960, the Supreme Court re-examined the claims of the Gulf States anew, and it acknowledged 9-mile state territorial limits for Texas and Florida.[199]

VI. RESOURCE LEGISLATION

Were there a change of the territorial sea boundary, the most significant changes in domestic law would relate primarily to 2 resources: minerals and fisheries. A summary of the major legislation affecting these resources will illustrate the effect on federal and state relations caused by scenario 1 (only the federal boundary is moved out to 12 miles while state boundaries remain at 3 miles) and scenario 2 (both federal and state boundaries move out to 12 miles).

A. Mineral Resources

As mentioned above at III.C.4., in 1945, President Truman broke from the traditional narrow-territorial-sea policy[200] and he claimed United States jurisdiction over minerals out to the edge of on the continental shelf.[201] However, the proclamation represented only vague principles until 1953 when Congress passed 2 statutes which embodied Truman's 1945 mineral claim. The Outer Continental Shelf Lands Act (OCSLA)[202] put the mineral proclamation into concrete law and delineated rights and responsibilities between the federal and the state governments.

The Submerged Lands Act (SLA) placed the right to resources within 3 (or 9) miles into the hands of the coastal states.[203] The OCSLA, though, elaborated on the federal claim to management of the minerals beyond 3 miles, in the area called the "Outer Continental Shelf"(OCS).[204] This made the federal government the landlord entitled to the lease and royalty revenues from that extensive zone (OCS). The revenues explain much of the importance of the OCS and intensify any discussion of ownership.

The OCSLA also established the application of federal law beyond the territorial sea out to the edge of the continental shelf.[205] However, where not inconsistent with federal policy or legislation, the content of the law applied in the OCS was to be that of the adjacent coastal state.[206]

B. Fisheries

As described above, in III.C.1., fishery control began as a part of coastal state jurisdiction and gradually came under federal control. After the 1945 Truman Fisheries proclamation,[207] the 1964 Bartlett Act,[208] and the 1966 extention of control out to 12 miles,[209] Congress passed a very comprehensive law in order to protect near-lying fisheries from foreign exploitation and unify the fishing regulations on all United States coasts. That law was the Magnuson Fisheries Conservation and Management Act (FCMA)[210] and it extended United States control of fisheries out to 200 miles--another significant departure from the open seas policy espoused in earlier years.[211] The FCMA established a regime for managing the fisheries off the coast of the United States within "a zone contiguous to the

territorial sea (extending out) to a line 200 nautical miles from (shore)."[212]

The FCMA performs a double service. On the one hand, it protects near-lying fisheries from overexploitation by non-United States fishermen. On the other hand, this law sets up a domestic regional fishery management structure for the federal coastal waters (out to 200 miles) in order to avoid the fragmented management which resulted from leaving control up to the individual states. Nevertheless, the states have significant influence in this federal program because the regional councils are made up of members appointed from a list submitted by the governors of the participating coastal states.[213] These fishery management councils are the policy-setting organs of the FCMA, a fact that gives the states in each region significant control over fishing policy. But decisions of these councils are subject to approval by the Secretary of Commerce.[214] Since the geographic jurisdiction of these councils begins at the 3-mile line, fishery management from 0 to 3 miles remains in the hands of the states. However, state control even within 3 miles is not absolute. The FCMA forbids the states to act in a way that would seriously affect the fisheries of the fishery management zone (FMZ).[215]

Again, this arrangement demonstrates the federal-state interaction in fishery control. On one hand, the state has input into the management decisions for the federal waters because it selects many of the members of the FCMA councils which set policy in the federally-controlled FCMA zone. On the other hand, the

federal government has a veto power over what it perceives as detrimental state practices within the state-controlled 0-3-mile zone.

VII. ALTERNATE SCENARIOS

If the federal government extends the territorial sea from 3 miles to 12 miles from shore, 1 of 2 general scenarios of the aftermath is likely: (1) The national territorial limit would move out to 12 miles but the state boundary would remain at 3 miles; or (2) both the national territorial limit and the state limit would shift simultaneously out to 12 miles.[216]

A. Scenario 1: The State Boundary Remains at 3 Miles.

Because of the 1947 case, U.S. v. California the federal government controls the coastal seas beyond the low-tide line,[217] and therefore, the states have no rights in these waters not specifically granted by the federal government. This means that an extension of the national territorial sea boundary would not automatically bring the state boundary along with it. Moving the state boundaries would require a specific act of Congress and Congress could decline to move those boundaries.[218]

However, some current federal statutes contain wording which would seem to automatically give the states some authority out to 12 miles when the national territorial limit is extended. These statutes use the term "territorial limit" as a boundary measurement for some other coastal zone. An example of such wording occur in the Coastal Zone Management Act (CZMA)[219] which

states that the "'Coastal zone' means the coastal waters . . . seaward to the outer limits of the United States territorial sea."[220] The shift in the national territorial sea boundary would seem to automatically move the outer boundary of the coastal zone management area seaward to 12 miles from shore, where the (new) territorial limit would be.[221] However, such complications can be easily resolved by changing the wording of the affected laws.

If, in this first scenario, the state authority remained at 3-miles, the question becomes, "What difference would the shift make concerning federal authority in the new federal territorial zone (Zone A)[222] from 3 to 12 miles? " The examination is simplified by using a checklist approach.

a. Control over minerals. There would be no change since the federal government already controls minerals from 3 miles out to the edge of the continental shelf.[223]

b. Control over fisheries. Since the FCMA already establishes federal control from 3 to 200 miles out,[224] there would be no significant change.

c. Control over customs. Federal customs authority already reaches 12 miles out, and the courts use an elastic interpretation of customs authority which presently allows federal arrests beyond even the contiguous zone (12 miles)[225]

d. Environmental protection. There would be no change in the coverage of the federal authority to regulate pollution since the Marine Protection Act[226] already regulates out to 12 miles from shore. Additionally, since the EEZ proclamation of March

10, 1983,[227] United States asserts responsibility for protection of the marine environment out to the 200-mile boundary.[228]

e. Domestic civil and criminal law. There would be no major change for United States nationals since the OCSLA has already extended U.S. federal law, in the form of the law of the coastal state, out to the edge of the continental shelf,[229] and other federal legislation reaches United States nationals and ships on the high seas.[230]

f. Criminal jurisdiction over foreign vessels. This conceivably could be affected by a U.S. territorial sea change since, in theory, criminal jurisdiction ends at the seaward edge of the territorial sea. Still, in practice, U.S. jurisdiction extends for some things out to at least 12 miles, and often beyond, depending on the circumstances of the case or the leaning of the court.[232] However, extra territorial criminal jurisdiction over foreigners is more a matter of international law, and a thorough examination of this is beyond the scope of this article.

g. Civil jurisdiction over foreign vessels. The Convention on the Territorial Sea and the Contiguous Zone (CTSCZ),[233] governs this issue, at least with respect to nations which are a party to the convention, as is the United States. The CTSCZ allows the coastal nation to exercise civil jurisdiction only out to the seaward boundary of the territorial sea, and no civil jurisdiction at all is permitted over foreign persons on board a foreign ship.[234] The provision allowing civil jurisdiction in, and only in, the territorial sea implies that an expanded

territorial sea would result in a geographically expanded civil jurisdiction. But elaboration on this topic also fits more appropriately in a discussion on international law.

In summary, under scenario 1, the region beyond 3 miles, already essentially a federal domain, would remain federal. An extension of only the national territorial sea out to 12 miles, would do little more domestically than federalize a federal reserve.

B. Scenario 2: The State Boundary Also Changes from 3 to 12 Miles from Shore.

In this second scenario, both the federal and the state boundary would be extended out to 12 miles from shore. The repercussions would be multiple, interdependent, and complicated. The most significant changes in domestic federal law would turn on the revisions of rights and duties concerning (a) mineral and (b) fishery exploitation.

A certain amount of territory, the submerged land between 3 and 12 miles ("Zone A" for the purposes of this article; see Appendix) would be taken away from federal control and given to the coastal states. The Supreme Court case, U.S. v. California, established that states cannot claim any land beyond the low tide mark unless authorized by Congress.[235] Therefore, for this second scenario to occur, Congress must explicitly grant the additional ocean territory between 3 and 12 (Zone A) miles to the coastal states.

Section 1301 of the Submerged Lands Act (SLA) would have to be amended to bring about the extension of state control out to 12 miles. This change in § 1301 of the SLA would automatically be incorporated into § 1331 of the Outer Continental Shelf Lands Act (OCSLA) and the OCSLA inner boundary would begin at 12 miles. The inner boundary of the FCMA would also automatically relocate out to the outer boundary of the states. This would be quite a simple operation, legislatively, but the repercussions would be complex.

1. Oil and Gas

The economic effects on oil and gas revenues exemplify some of the major alterations caused by scenario 2. If the federal government were to lose Zone A, it would also lose the revenue produced from the area. Figures from 1982, shown in the Appendix,[236] help demonstrate the effects of this change.[237] That year, the Zone A production amounted to 44% of all the oil from the Outer Continental Shelf (OCS) area (federal waters). This part of the OCS, from the state line out to 12 miles, is the part which would go from federal to state control in scenario number 2. Therefore, using 1982 figures, the federal government would have lost 44% of the oil royalty income ($751,104,667)[238] which would have gone into the treasuries of the producing coastal states, not into the national treasury.

The story is the same concerning gas production. The gas production in Zone A represented 24% of the total OCS production.[239] This 24% (or $499,331,78) [240] would become state income, instead of federal income, if Zone A were to go under

state control. The total combined oil and gas royalty payments from Zone A in 1982 equalled $1,250,436,455. This income amounts to $5.52 per person in the United States.[241]

2. Fishery Resources

With a shift in the national and state territorial limits out to 12 miles, the legal framework regulating the fishery resources also could be affected, but in a way quite different from the impact on oil and gas resources. There are no royalty or lease payments connected with fishing, and thus, no revenues to move from federal to state treasuries, as there are with oil and gas payments.[242] Fishermen do pay licensing fees, but the fees amount to an insignificant percentage of the industry value and are usually intended to only cover costs.[243]

The FCMA regulates fisheries beyond state waters and therefore appears to leave the fishery regulation of the territorial sea in the hands of the coastal states,[244] with some exceptions to be discussed later. From the territorial sea outward, the FCMA relies on the regional fishery management councils as the governing organs. Were the states to gain control out to 12 miles, as in scenario 2, the FCMA would automatically relocate its inner boundary to 12 miles from shore and the jurisdiction of those regional councils would begin at 12 miles instead of at 3. [245] Such change appears simple but actually could have the effect of almost completely dismantling the FCMA regulatory arrangement by removing the bulk of the fishing grounds from FCMA control. Since more than 70% of the fish within 200 miles of the U.S. coast is found within 12 miles

of shore,[246] if state boundaries also moved out to 12 miles under scenario 2, 70% of the fishing resource would be under state control and relatively independent of the FCMA regulatory scheme which would then be left with only 30% of the fisheries. The FCMA was passed in 1976 precisely because it became apparent that the fragmentation of fishery management among the coastal states did not work.[247] This fragmentation of 70% of the fisheries could lead to the functional dismantling of the FCMA structure. However, the dismantling is only a possible, not a necessary result of this change in state boundaries. Congress has the discretion to extend the state authority out to 12 miles but to limit the power which the state may exercise at that distance; transfering most, but not all, of the sticks in the bundle to the states.[248] Therefore, if Congress wanted to give states ownership out to 12 miles yet preserve the current FCMA structure, Congress could simply extend state ownership--minus fishery control authority--out to 12 miles. The control of fisheries from 3 miles out would remain under federal (FCMA) control. If this were done, the FCMA would survive intact.

It is impossible to predict what Congress would do with these choices. Would it simply follow the 1953 SLA pattern and grant nearly complete ownership and jurisdiction in Zone A to the coastal states? In this case, as mentioned, the regionalized approach to standardization of fishery management would be seriously undermined.[249]

If Congress rejects this fragmentation, would it opt for the opposite possibility and simply freeze the geographic fishery

management areas as they are now under the FCMA? A coastal state would have most of the traditional state "sovereignty" over Zone A, except for the control of fishing in that zone. Or would there be some sort of compromise which would grant to the coastal states a partial extention (out to 4 miles?) of fishery control? One can only speculate at this point.

From an international point of view, it seems unlikely that the United States will not eventually follow the overwhelming trend[250] and adopt the 12-mile territorial sea. Even though the United States has considerable authority outside the territorial sea, the extra control over foreign shipping, especially foreign warships which might not be engaged in fully innocent passage, might be sufficient reason for extending the territorial sea limit.[251] As the United States encounters restrictions within the 12-mile territorial sea off other nations, such as the limitations on aircraft overflight, limitations on data gathering, prohibitions against launching aircraft (presumably including helicopters) or any military device, and the limitations on research;[252] conceivably the desire to impose reciprocal restrictions on ships of those same nations would lead the United States to extend its territorial waters.

VIII. COASTAL AND LANDLOCKED STATES

In spite of the complications which would accompany the adoption of a 12-mile territorial limit, the domestic reasons for such a move would be strong because the expansion of the territorial sea would put resources, and the revenues generated

by these resources, into the hands of states. Furthermore, as technology increases the ability to extract minerals from the ocean bed and from the ocean water itself, almost any coastal waters may become revenue-producing because of these non-living resources. Since the oil and gas revenues alone would amount to an influx of at least $5.52 per person,[253] the states would likely be quite eager to acquire such a new source of income. However, as will be mentioned later, this could create an environmental nightmare because of increased demands for unbridled exploitation of the coastal waters.

The coastal states were the only recipients of the SLA largesse in 1953 because Congress intended to restore what had been the commonly accepted reach of the coastal states up to that time.[254] That restorative purpose of 1953 is not applicable to the Zone A plan. The situation in relation to the 12-mile territorial sea resembles more the annexation of new territory, Zone A. The landlocked states could justifiably ask why the new revenue windfall from Zone A should not go to all 50 of the states and the United States territories.[255] A state like Nebraska, for example, with a population of approximately 1.6 million,[256] would stand to gain $8.6 million yearly[257] from the new 3-9-mile coastal zone. It would be surprising indeed if Nebraska simply turned down this income.

Coastal states could gain from the Zone A transition by increased mineral-related income and by increased control in the coastal waters. This second advantage is relevant especially in light of the recent Supreme Court case, Secretary of the Interior

v. California,[258] which weakened the coastal states' ability to control oil and gas related activity in the OCS (seaward of state territory). The Supreme Court ruled that the "consistency provision" of the Coastal Zone Management Act (CZMA)[259] did not apply to federal leasing of tracts in the OCS, thus cutting off California (and other coastal states) from influencing early siting of later oil and gas production. The extension of state marine boundaries out to 12 miles would concomitantly extend state control over all phases of mineral-related activity.

In order to profit from scenario 2, the landlocked states might well bargain for a share of Zone A revenues in exchange for their support in Congress on legislation to give the coastal states a 12 mile marine boundary. The change to a 12-mile territorial limit may precipitate the largest revenue-sharing mechanism of the century, if the states view Zone A as a new, and common, source of income.

This 50-state sharing arrangement is quite distinct from revenue sharing proposals which draw a percentage from the Outer Continental Shelf (OCS) revenues.[260] The Zone A prospect would be generally parallel to the 1953 SLA transfer of title over the Zone A mineral wealth to the 50 states. The revenues would be completely controlled by the states. The OCS revenue sharing, on the other hand, represents a federal grant from OCS mineral revenues to the coastal states for a limited purpose, to help compensate for environmental and economic costs caused by the mineral production in the OCS. The OCS revenue-sharing money is

to be subject to changes in appropriation decisions and would be affected by changing administration policy.

IX. PLANNING

The possibility of cooperation for mutual benefit between the coastal and landlocked states raises several questions. Who would be the administrating authority in Zone A? To whom would the oil drillers send the royalty check? Who would enforce production and environmental regulations? How would the fishery management councils be made up? Would the landlocked states even participate in fishery matters? Would there be formed a non-federal, national council to administer Zone A? Or, would the landlocked states pay out a percentage of their new revenues to reimburse the coastal states for administering the zone? What would happen to the coastal environment?

It is proper to ask if the respective interests of the coastal states and of the landlocked states are the same. The coastal states would have to concern themselves with fishery management, mineral exploration, environmental protection, overall conservation, recreation, tourism, and an occasional hurricane. Would the landlocked states only be concerned with the monetary income and would they resist environmental and conservation needs which would cut into short-term profits? It is quite possible that the coastal states would have to have the deciding vote over environmental enforcement, resource exploitation, and coastal development. Otherwise, the landlocked states, which form a 27 to 23 majority in the Senate,[261] may be

overzealous in the development of the resources but under concerned with the long-term stewardship of the coastal regions.

X. ZONE A IN OPERATION

This author would offer the following glimpse of the 50-state sharing arrangement. The 12-mile state-owned zone would most likely occur over the strong resistence of the federal government which would fight the loss of $3.7 billion. However, following the call to de-centralize the federal role, and also envisioning a way to provide funds to the states to cover the expenses dropped recently by the federal government, Congress might well vote the 12-mile zone into effect. (Federal anguish might be assuaged by pointing out that the Zone A revenues amount to only 0.75% (0.0075) of the federal income). The landlocked and the coastal states could divide the Zone A revenues on a per capita basis, retaining the 16.66% royalty rate the federal government uses now in that area. [262] The advantage of the per capita method would be its simplicity. The coastal states, which would then extend out to 12 miles, could administer the territorial sea zone, including the mineral, environmental, and economic aspects, as they do with the 3-mile zone now in effect. Since these coastal states would be collecting their share of the mineral royalty and rent revenues anyway, they could simply collect all payments from the oil producers and in turn disperse the proportional shares to the inland states. The inland states could share all administrative costs by returning a percent of their Zone A income to the coastal states in pro rata payment for

the administration of Zone A. Furthermore, since it would be the coastal states which would receive the impact of environmental disasters and the effect of the on-shore, oil-related industries with the corresponding population fluctuations, each coastal state could have a full veto over mineral production of any kind in its own state territory. The coastal states could still receive an additional OCS revenue-sharing contribution to help offset the impact of production beyond 12 miles in the OCS waters adjacent to the states.

The landlocked states would not have to fear the abuse of the coastal state veto power because any curtailment of Zone A production by coastal State X would inescapably reduce the Zone A income into State X as well as into any one of the other 49 states. Also, if State X cut back on production, there could still be up to 22 other coastal states still allowing mineral extraction. Federal environmental standards would be necessary and the availability of citizen suit, with statutory injunction remedies, would help insure compliance in this greatly de-centralized arrangement.

Fishery control would be left in the federal government so as to avoid fragmented regulations over this mobile living resource. There would seem to be no need for the inland states to have any say at all in the fishery management. Thus, the FCMA, or its successor, would continue to form the regulatory framework for fishing. In fact, the federal government might manage a trade-off: in return for federal acquiescence to the extension of the coastal state boundaries out to 12 miles, the

coastal states may be willing to turn over fishery management within 3 miles to the federal government.

It is already time to thoroughly examine and then to begin to select from various resource management alternatives possible in the coastal waters (including Zone A). Inattention may permit unconsidered, yet irrevocable decisions that will inadequately meet general needs. Knecht and Westermaeyer suggest a study commission similar to the Stratton Commission.[263] Whatever assemblage is adopted, serious consideration should be given to proportional representation for the 27 inland states at the planning stage. These states potentially have a deep interest in any re-allocation of coastal resources.

* * *

"(T)he present 3-mile dividing line has no special merit and ... should now be viewed simply as a relic of bygone days."[264]

FOOTNOTES

[1]"Sovereignty is . . . used to describe the legal competence . . . (including) jurisdiction (and) legislative competence over national territory . . . ." Ian Brownlie, Principles of Public International Law, 282-3 (2d ed. 1973). "(S)overeignty of a State means the residuum of power which it possesses within the confines laid down by international law." J.G. Starke, An Introduction to International Law, 91 (5th ed. 1963). Sovereignty is the authority and power to govern unfettered by outside authorities. No nation has absolute sovereignty because all nations have agreed, in treaties, to limit their exercise of power in some ways.

[2]Thomas W. Fulton, The Sovereignty of the Sea, 537 et seq. (1911)[1976]. See also, Louis Sohn, in his excellent 1984 summary of ocean law, and Philip Jessup who wrote approximately half a century before him. Both propound the view, contrary to Fulton's, that (in Sohn's words), " Subject to the right of innocent passage through the territorial sea and to special passage rights through straits and archipelagic waters, the coastal state (nation) has the same sovereignty over its territorial sea and over the air space, seabed, and subsoil thereof, as it has with respect to its land territory." Sohn, The Law of the Sea, 94 (1984); Philip Jessup, The Law of Territorial Waters and Maritime Jurisdiction, 42 (1927).

[3]Id. at 538.

[4] C. John Colombos, The International Law of the Sea, 89 (6th rev.ed.1967)[1972]. In addition to 6 revisions of his book, to his credit, Colombos, a master of law, has served as a member of the Institute of International Law, and an associate member of the International Diplomatic Academy; both in Britain.

[5] In this paper, "mile" will refer to a nautical mile. In 1959 the U.S. adopted a nautical mile of 1,852 meters which is the international measurement. Webster's Third New International Dictionary, 1508 (1967). (The statute mile equals 1,609 meters. Websters. at 1399.) A nautical mile equalled 1,853 meters in 1927 when Philip Jessup wrote. That corresponded to the geographic mile. Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, xxxviii (1927). Jessup was, among other things during his lifetime, a representative for the United States to the formation of the United Nations. He served there from 1948 to 1952. Later, from 1961 to 1970, he was a judge on the International Court of Justice. He was a prolific writer, especially during his earlier career, and wrote 7 books on international law subjects, one in French.

[6] Fulton, supra note 2 at 539.

[7] F. Garcia Amador, Exploration and Conservation of the Resources of the Sea, A Study of Contemporary International Law, at 14, 2d ed. 1963.

[8] T. W. Fulton, The Sovereignty of the Sea, 3,4 (1911, reprinted 1976).

[9] Id. at 33, 91, 110-1, 339, & 542-3. Denmark's rationale was that since it controlled Norway, Iceland, and the near section of Sweden, it controlled all sides of the relevant waters and thus had the right to control access as if the waters formed a lake within national boundaries.

As recently as the middle of the 19th century the Danes charged a toll to ships sailing to and from the Baltic Sea through the narrow sea between Denmark and Sweden.

[10] Fulton, supra note 8 at 106. H. Gary Knight, Managing the Sea's Living Resources, 14-15 (1977) and Gerard J. Mangone, Marine Policy for America, 25 (1977). The series of treaties began in 1493, the year after Columbus returned from his first voyage to the "New World." A papal bull (bulletin) from Pope Alexander VI, done at the behest of the rulers of Spain and Portugal provided an orderly division of the new regions. The 1493 line of demarcation fell 100 leagues west of the Azores, which lay the line roughly along 37° west longitude. Everything to the west of this line was to belong to Spain, and everything east was to go to Portugal. A map will show that 37° west longitude falls just east of South America which meant that the Portuguese hardly got any territory in the New World. So, at the urging of the Portuguese ruler, the line of demarcation was moved by the Treaty of Tordesillas, in 1494, another 270 leagues to the west putting the line near 48° west longitude. This was the legal basis for Portugal claiming Brazil.

The third grant dealt with the Pacific region. In 1529, at the Treaty of Saragossa, the line of demarcation for the Pacific region was drawn near 132° east longitude, running across the western tip of New Guinea. The final effect of this series of treaties was to grant the hemisphere including all of North and South America (except Brazil), the bulk of the Pacific Ocean including Japan, New Guinea, and half of Australia, to the Spanish. This put most of Asia, Africa and the Atlantic Ocean under the claim of Portugal.

[11] Fulton, supra note 8 at 107, Mangone, supra note 10 at 25.

[12] Mangone, supra note 10 at 25, 26. See especially, Fulton, supra note 8 at 338 to 344.

[13] John Selden, Of the Dominion,or, Ownership of the Sea, London, 1652; earlier Latin version, Mare clausum seu De Dominio Maris, was printed in 1635. But even before Selden could fire his volley, another British jurist, William Welwod (also, Welwood) wrote an almost immediate response against Grotius' open

sea theory and advanced a strong assertion that national claims to the ocean were as proper as claims to land. "Surlie, that lack of solidity for man his trading thereon by foote, shall not hinder the solid possession of (the sea), farre lesse the occupation and acquiring, if we will give to the sea, that which the Iurisconsults indulgently grant to the land..." William Welwod (also Welwood), An Abridgement of all Sea-Lawes, 67 (1613). [Univ. of Miss. Law Library], reprinted 1972. Library of Congress Catalog card Number: 72-6039. Fulton mentions Welwood but says Welwood's book was not published and lay undiscovered until ca. 1870. However, the copy (reprint by direct reproduction) has a printing date, in the original type setting, of 1613. The printer's name, also in original type, is given as Humphrey Lownes.

[14] Mangone, supra note 10, at 26.

[15] Fulton, supra note 8 at 57ff, 165ff, 209ff, 441ff, Jessup supra note 5, 11-16.

[16] Robert G. Heinzen, The Three Mile Limit: Preserving the Freedom of the Seas, 11 Stanford Law Review 597,606-7(1959). Heinzen, speaks of the Danes using ocean zones to help establish a monopoly on trade with Greenland. See also Fulton supra note 8 at 5.

[17] One of the earliest Supreme Court cases in American law dealing with the territorial sea, Church v. Hubert, turned on Portugal's practice of excluding non-Portuguese traders from Brazilian waters. An American had sailed into Brazil's territorial sea anyway, to trade and subsequently had his cargo seized by the authorities. His insurance company refused to reimburse him since he had broken the local (Portuguese) law, so he sued the company. Chief Justice Marshall stated that the insurance company should not pay for the illegal risk taken by the plaintiff but he remanded the case on an evidentiary matter. 2 (Cranch) U.S. 187, 2 L.Ed. 249 (1804).

[18] See notes 102 and 105, infra.

[19] Italian jurist, Bartolus of Saxo-Ferrato declared this to be the law in 1357, Fulton, supra note 8, at 539.

[20] Id. at 539-40.

[21] Id. at 542-3. The term, "thalweg," (meaning "valley way") is of Scandinavian origin and refers to the midstream or the deepest point (or mid point) in a dividing stream or sea.

[22] Id. at 111. See note 9, supra.

[23] Heinzen, supra note 16, at 609 and at 612. Heinzen gives several examples of the on-going proposals and counter-proposals

on the territorial sea width that went back and forth throughout the 1700's.

[24] Id. at 605-608.

[25] Heinzen, supra note 16 at 597, 604 (1959).

[29] The narrowest zone to which the Scandinavians "withdrew" was set at a "Scandinavian league," or 4 nautical miles. This distance was applied to the ocean around Iceland, the Faroe Islands (both Danish possessions at the time), and eventually became the uniform Scandinavian measurement up to the mid-1900's. For a discussion of the "Scandinavian league," see Heinzen, supra, note 16 at 606-7, n. 29 & 31 and at 610-11. See also, Fulton, supra note 8 at 538. See also, Robert W. Smith, Limits in the Seas 8: National Claims to Maritime Jurisdiction, (3d rev.1975), Office of the Geographer, No. 36, U.S. Dept. of State, at 47, 130, & 149. (hereinafter cited as Limits).

[27] The Italian was named Galiani. His idea was influential, though his ballistics were off. The actual range of artillery at that time was said to be significantly under 3 miles. Heinzen, supra, note 16 at 605 n. 26, and at 616, n 67, 68.

[28] The Twee Gebroeders, brought the 3-mile limit officially into British law. The British had captured a ship within 3 miles of the Prussian coast and the English judge, Sir William Scott (Lord Stowell) ruled that the capture did indeed occur within the neutral territory of Prussia. 3 C. Rob. 162, 165 Eng. Rep. 422 (High Ct. of Admiralty 1800), reported in Fulton, supra note 8 at 577-79.

[29] In this case, the British had captured an American ship within 2 miles of a sandbar off the mouth of the Mississippi River. Lord Stowell decided that the sandbar was American territory and so the ship had been within the 3-mile zone of American sovereignty. 3 C. Rob. 373, 385c, 165 Eng. Rep. 809 (High Ct. of Admiralty 1805), reported in Fulton, supra note 8 at 577 ff.

[30] 81 U.S. (14 Wall.) 170, 187, 20 L.Ed. 822, 826 (1872).

[31] Id. at 187-88.

[32] Erin Bain Jones, Law of the Sea, 60 (1972) Jones calls the 3-mile principle "a customary rule of international law," Mangone, supra note 10 at 28-30. Gary Knight, however, comments on the lack of unanimity. Knight, supra note 10 at 21.

[33] There are 3 significant sources of international law: (1) international treaties which specifically describe the rules which the signatories will follow; (2) international custom, as evidence of a general practice which is accepted as law; and (3) general principles of law recognized by civilized nations

(somewhat analagous to the concept of "equity" in common law). Gerhard von Glahn, Law Among Nations, 18 (1970). von Glahn includes a fourth source, judicial decisions and the writings of legal experts, but he brands this combination source as "indirect and subsidiary." Both the third and fourth sources are most properly used by international courts and have less relevance to the deliberations between nations.

[34] One international law expert who believed that the 3-mile dimension was the standard under international law was Philip C. Jessup, author of The Law of Territorial Waters and Maritime Jurisdiction, 62, 66 (1927). At page 115, Jessup attempted to explain the variations by defining the jurisdictions beyond 3 miles as not true territorial sea jurisdictions, but this assertion is not consistent with the diversity in origins and purposes of the coastal zone.

[35] Jessup, supra note 5 at 42. Jessup himself thought that the 3-mile dimension was established in international law. However, in his own treatise, he listed nations which explicitly claimed a different dimension for their territorial sea, or claimed some other zone which had

[36] Id. at 31-39.

[37] Id. at 26-27.

[38] Id. at 41-42.

[39] Fulton, supra note 8 at 663-4. "It is quite appropriate, therefore to refer to (the 3-mile limit) as the "ordinary limit," ...(b)ut...it is erroneous to declare,...that territorial jurisdiction cannot be carried further." See also Knight, supra note 10, at 21: Knight stated in 1977 that the 3-mile limit was not applied consistently enough to be considered a rule of international law.

[40] Mangone, supra, note 10 at 30.

[41] Id.

[42] Id. See also Andrassy, International Law and the Resources of the Sea,41(1970), who states that 17 nations at the 1930 Hague Conference claimed territorial seas beyond 3 miles.

[43] Convention on the Territorial Sea and the Contiguous Zone, (CTSCZ) 15 UST 1606 (1958), done at Geneva on April 28, 1958; ratified March 24, 1961; entered into force, September 10, 1964.

[44] McDougal and Burke, The Public Order of the Oceans, 487(1962).

[45] According to information from the State Department, the following is a list of nations which claimed 12 miles or more for the width of their respective territorial seas in 1961, the year before McDougal and Burke published their book(supra note 44): Bulgaria (12), China (12), Equador (12), Egypt (12), El Salvador (200), Ethiopia (12), Guatamala (12), Iran (12), Iraq (12), North Korea (12), Libya (12), Mexico (9), Panama (12), Soviet Union (12), Sudan (12), and Venezuela (12). Source: Limits, supra note 26. See also Andrassy, supra note 42, at 41. He says that "By 1958 adherents to the three-mile limit were in a minority...."

[46] Mangone, supra note 10 at 64-5. By 1981, only 22 nations adhered to 3 miles while 113 nations claimed a territorial sea limit broader than that, Limits, supra note 26 at 8.

[47] Smith, supra note 26.

[48] United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF. 62121, (1982), reprinted in 21 I.L.M 1245 (1982). (In this paper, the acronym, UNCLOS, without any Roman numeral after it is used to refer to the Convention [treaty]. With the Roman numerial, it refers to one of the 3 law of the sea conferences called since 1958.) See Limits, supra note 26.

[49] A similar view is found in Robert Knecht and William Westermeyer, State vs. national Interest in an expanded Territorial Sea, 11 Coastal Zone Management Journal 321 (1984). It should be mentioned that the United States does recognize the 12-mile territorial sea of those nations which claim such a dimension.

[50] See note 4, supra and accompanying text.

[51] See the extended quotation at footnote 44 in the text; several nations clearly wanted to exercise diverse authority in their coastal waters.

[52] The report was received by the Supreme Court in Oct. 1974. United States v. Maine, 420 U.S. 515, 43 L.Ed.2d 363, 96 S.Ct. 29 (1974); decree entered, 423 U.S 1, 46 L.Ed.2d 1, 96 S.Ct. 23.

[53] Such a property claim was rejected in 1876 in R. v. Keyn, 2 Ex. D., 63, 175 (1876), quoted in States' Rights in the Outer Continental Shelf Denied by the United States Supreme Court, 30 University of Miami Law Review 203, 210 (1975). [50 is apparently gone]

[54] Chief Justice John Marshall said that the coastal nation had the same "absolute" sovereignty in the territorial sea as on land. Church v. Hubbart, infra note 76. Philip Jessup stressed this point in his excellent 1927 work on ocean jurisdictions. Jessup, supra, note 5 at 115. The International Law Commission

was quoted by Elliot Richardson as concluding the same thing, with the exception of innocent passage. Richardson, infra, note 109 at 555.

[55] CTSCZ, supra note 43.

[56] Id. Art. 16,4.

[57] Id. Art. 3,5 and Art.12.

[58] Id. Art. 15,

[59] Id. Art. 19.

[60] Id. Art.20

[61] CTSCZ, supra note 43.

[62] "Innocent passage" is a term of international law meaning that the ship navigates the territorial waters of another nation either on its way elsewhere or on its way to a port-of-call in the coastal nation. Thus, the ship is not to be hindered but it may not stray or delay. Submarines must run on the surface showing the flag. Any violation of laws and/or regulations of the coastal nation can dissolve the "innocent" status. C. John Colombos, The International Law of the Sea, 134-5 (6th ed. 1967).

The CTSCZ convention gives an operative definition of innocent passage in article 14:

1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.
2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, of proceeding to internal waters, or of making for the high seas from internal waters.
3. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.
4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.
5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.
6. Submarines are required to navigate on the surface and to show their flag.

[63] Elliot Richardson Law of the Sea: Navigation and Other Traditional National Security Considerations, 19 San Diego Law Review 553, 560 (1982)

[64] McDougal and Burke, supra note 44 at 180, n.18. However, on close examination, this proves to be a reference to powers of the port director over vessels in the immediate vicinity of the port.

[65] Telephone conversation with Jeff Greiveldinger of the United States Department of State, Office of the Legal Advisor, February 11, 1985.

[66] Jessup, supra note 5 at 133.

[67] Id. at 134.

[68] Id.

[69] 8 USC § 1401(a) (1982).

[70] Heinzen, supra note 16 at 598-9.

[71] Fulton, supra note 8 at 593-5, and at 5.

[72] See Limits, supra, note 26.

[73] For a summary of the existence of different state marine boundaries, see the text accompanying footnotes 191-198, infra.

[74] See note 138, infra.

[75] See also Colombos, supra note 4 at 136 § 148. To accomplish their purpose, these English statutes extended limited authority for revenue control to 5 miles.

[76] Chief Justice Marshall referred to these British laws and cited them as found at 4 Bac. Abr. 543; this reference is in Church v. Hubbart, 2 Cranch (U.S.) 187, 199, 2 L. Ed. 249 (1804).

[77] Id. at 235-6.

[78] Mangone, supra note 10 at 27, treats of jurisdictions for protection against smuggling, health hazards, fishery depletion, etc. Jessup, supra note 5 at 75-91, gives examples of such "extra territorial claims" as exercised by Russia, Belgium, France, and others.

[79] Jessup, supra note 5 at 26. For a summary of the varied jurisdictions, see Fulton, supra note 8, at 593-5.

[80] Exec. Proc. Nos. 2667(minerals) & 2668(fisheries), 10 Fed. Reg. 12,303 (Sept. 28, 1945), reprinted in 59 Stat. 884-5 (1945). Concerning the fisheries, Truman did not claim any exclusive or unilateral authority over fishing grounds which were also worked by fishermen from other nations. However, he was quite sweeping, unilateral, and exclusive in his claim to fisheries not yet developed (fished) together with other nations.

"Where (fishing) activities (beyond the territorial sea yet contiguous to it) have been or shall ... be developed and maintained by (U.S.) nationals alone,... fishing activities shall be subject to the regulation and control of the United States." See also U.S. v. California, 332 U.S. 19, 34, 91 L. Ed. 1897 (1947).

[81] Elliot Richardson, Power, Mobility and the Law of the Sea, 58 Foreign Affairs, 902, 903 (1980).

[82] Colombos, supra note 4, at 97-8. See also Jones, supra,note 32. See also, Christine Schanes, The Extension of National Jurisdiction Over the High Seas, 43, (1975) (Copy of doctoral dissertation), available in University of Mississippi Law Library.

[83] "A comprehensive and satisfactory Law of the Sea Treaty would provide greater assurance of more uniform and stable ocean regimes. Failure at the Law of the Sea Conference would result in the continued trend of varied, inconsistent, and, most probably, more restrictive laws. Freedom of the seas might be something we read about in history:" Robert W. Smith, of the United States Department of State, 32 Professional Geographer (nr. 2) 223 (May, 1980). (Smith is the same person cited in note 26, supra, as author of Limits.) See also Richardson, supra note 81.

[84] UNCLOS, supra note 48. Remember, without the Roman numeral, UNCLOS refers to the treaty; with the Roman numeral, the acronym refers to one of the 3 ocean law conferences under United Nations sponsorship.

[85] Jones supra note 32; note the references under "Conferences" in Jones' index, at 158.

[86] Supra notes 43-45, and accompanying text.

[87] (1) Convention on the Territorial Sea and the Contiguous Zone, 15 UST 1606 TIAS 5639, (1958), done at Geneva on April 29, 1958, ratified March 24, 1961, entered into force, September 10, 1964. (hereinafter cited as CTSCZ).

[88] (2) Convention on the High Seas, U.N. Doc. A/CONF. 13/L.53, 13 UST 2312, TIAS 5200, done at Geneva on April 29, 1958, ratified March 24, 1961, entered into force Sept. 30, 1962.

[89] (3) Convention on Fishing, etc., U.N. Doc. A/CONF. 13/L.54, 17 UST 138, done at Geneva on April 29, 1958, ratified March 24, 1961, entered into force March 20. 1966.

[90] (4) Convention on the Continental Shelf, U.N. Doc. A/CONF. 13/L.55, 15 UST 471, done at Geneva on April 29, 1958, ratified March 24, 1961, entered into force June 10, 1964.

[91] Schanes, supra note 91 at 80-83. At this conference, the United States did cooperate with Canada and suggest 6 miles as the standard for the territorial sea breadth. However, the idea did not win approval and it was permanently abandoned. The 6-mile offer was essentially an aberation from the consistent 3-mile position. See note 116, infra.

[92] See 21 International Legal Materials, 1245(1982) for background of UNCLOS III. See also, Schanes, supra, note 91, at 83.

[93] 21 International Legal Materials (ILM) 1477 (1982); U.N. Chronical 3 (June, 1982).

[94] September, 1983, COL update, Citizens for Ocean Law, 1735 New York Ave., N.W. Suite 400, Washington, D.C. 20006.

[95] Ratification will generally come after completion of the work of the Preparatory Committee and its clarification of certain procedures. As of Sept. 11, 1984, only 13 nations have ratified it: the Bahamas, Belize, Cuba, Egypt, Fiji; Gambia, Ghana, Ivory Coast, Jamaica, Mexico, Namibia, Philippines & Zambia. Information is from a Sept. 11, 1984, phone call to the United Nations. However, most nations are delaying ratification intentionally to give the Preparatory Commission time to prepare the rules and procedures for the administration of the treaty.

[96] The provisions of UNCLOS may also be binding, as international customary law, for nations which acknowledge the specific practice embodied in the provisions. Martin H. Belsky, A Strategy to Avoid EEZ Conflicts, 27 Oceanus 19,20(1984/85). The effect that the UNCLOS negotiations have had on international law was reflected by the statement of Leigh Ratiner, an international lawyer testifying at House foreign Affairs Committee hearings in 1982: "(I)t is ... possible now to state categorically that under customary international law a 12-mile territorial sea is permissible." (emphasis added) "U.S. Foreign Policy and the Law of the Sea, Hearings before the House Foreign Affairs Committee (1982), GoDoc nr.: Y4.F76/1:UN 35/48. hereinafter referred to as (Foreign Affairs). The United States State Department explicitly considers navigation provisions of "the '82 treaty" (UNCLOS) to be valid international customary law (from a phone conversation with Jeff Greiveldinger, of the Office of the Legal Advisor, 2/11/85).

[97] UNCLOS, arts. 1-32 at 21 I.L.M. 1271-76 (1982).

[98] Id. art. 33 et seq.

[99] Id. arts 55-75.

[100] Limits, supra note 26. Note the dates of the 200 mile claims for each nation.

[101] Statement by President Ronald Reagan in connection with his EEZ proclamation, March 10, 1983, found in Weekly Compilation of Presidential Documents, pp. 1-584 (1983), at pp. 383-85 [March 10, 1983]. There is talk about the UNCLOS treaty comprising international customary law.

[102] While reviewing the history of the U.S. territorial sea, a 1947 U.S. Supreme Court case, United States v. California, 232 U.S.19, 32, 91 L.Ed. 1889, 1896 (1947), commented that "shortly after we became a nation... (the U.S. adopted)...a definite (3-mile) marginal zone to protect our neutrality." (emphasis added) The same point is made in Heinzen, Supra, note 19 at 623. The French and British could capture each other's ships on the high seas; the question was, how close to U.S. shores could this activity take place. Such capturings could endanger American lives and property if carried on too close to a port, but more importantly, U.S. acquiescence to such a capture within its territorial waters would be seen by the losing party as complicity with the victor and thus endanger U.S. neutrality. Mangone, supra note 10 at 26 and Heinzen, supra note 16 at 615, 623. See also note 103 infra.

[103] Philip Jessup, supra, note 5 at 50. See also J. K. Oudendijk in Status and Extent of Adjacent Waters, 99 (1970); Mangone, supra note 10 at 26; and Fulton, supra note 8 at 574. Heinzen states that Jefferson also said the identical words to the British government, supra note 16 at 615 n.61. (See note 114 infra)

[104] The Neutrality Act, 1 Stat. 381, § 6 (1794).

[105] Church v. Hubbart, supra note 76.

[106] Id. at 234 (U.S.).

[107] He illustrated this extended special jurisdiction by referring to the fact that the United States sent "revenue cutters to visit vessels 4 leagues (12 miles) from our coast." In fact, Marshall mentioned that any nation had the right "to secure itself from injury" and that this right was not "limited within any certain marked boundaries." Marshall stated that the range of authority might contract or widen depending on the circumstances of the sea and the coast. Church v. Hubbart, supra note 76 at 235-36 (U.S.).

[108] A series of Presidential proclamations in 1940 clearly demonstrated this buffer function for the territorial sea. President Roosevelt sought to safeguard U.S. neutrality by closing the territorial sea to armed merchants and submarines belonging to specific countries involved in hostilities. Citing a 1917 Act, [40 Stat. 220 (1917), 50 USC 191 (1982)] as the authority, he announced 4 proclamations: Proc. No. 2400, 54 Stat. 2699 (1940); Proc. No. 2406, 54 Stat. 2705 (1940); Proc. No. 2409, 54 Stat. 2707 (1940); and Proc. No. 2412, 54 Stat. 2711

(1940). Each proclamation excluded the specified ships of one or more involved nations from the U.S. territorial waters. See also Jessup, supra note 5 at 56.

109 Elliot L. Richardson, Law of the Sea: Navigation and Other Traditional National Security Considerations, 19 San Diego Law Review 560-563 (1982). Also by the same author, Power, Mobility and the Law of the Sea, 58 Foreign Affairs 902, 904 (1980).

110 In a case which will later receive considerable elaboration, the U.S. Supreme Court related that the concept of the 3-mile territorial sea was still nebulous at the time the United States came into being. United States v. California, 332 U.S. 19, 22, 91 L.Ed. 1889, 1895 (1947).

111 Journal of Congress, 185, 186, 187 (1781).

112 Neutrality Act, June 5, 1794, Sess. I, ch. 50, § 6, 1 Stat. 381, 384.

113 Supra, notes 90, 91, and 100.

114 This is the diplomatic note mentioned above at text with note 90. The note was from Jefferson to the French Minister: 1 American State Papers, Foreign Relations 183 (1832). A similar note was sent the same day to the British Minister. Jefferson went on to explicitly equate the league with "3 geographic miles." See also, Jessup, supra note 5 at 6. See also, Heinzen, supra note 16 at 615, n.61; and Mangone, supra note 10 at 26. Jefferson later tried to wiggle out of the 3-mile constraint by declaring the limit extended to middle of the Gulf Stream, but apparently this attempt was not precedent-setting. Fulton, supra note 8 at 574.

115 See Church v. Hubbart, supra note 76 at 199.

116 In a summary of the United States position on the territorial sea, Jessup cites statements by U.S. administrations from 1793 to 1924 clearly lauding the 3-mile distance, Jessup, supra note 5, 50-56. The traditional position of the United States in support of the 3-mile limit is also found in 1 Moore, International Law, 705(1906) and in 1 Wharton, International Law, 107(1886). See quote in note 130, infra. There was an essentially insignificant one-time mention of a 6-mile distance in 1958: see Schanes, note 91 supra.

117 Cunard Steamship Co. v. Mellon, 262 U.S. 119, 122-3 (1922). "It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes...a marginal belt of the sea extending out from the coast line outward a marine league, or 3 geographic miles. Church v. Hubbart, 2 Cranch 187, 234, 2 L.Ed. 249 (1804); The Ann, 1 Gall. 1 Fed. Cas. 926 No. 397 (1812); United States v. Smiley, 6

Sawy. 640, 27 Fed. Cas. 1132 No. 16, 317 (1864); Manchester v. Massachusetts, 139 U.S. 2d 240, 257, 258, 35 L. Ed. 159, 164, (1891); Louisiana v. Mississippi, 202 U.S. 1, 52, 50 L.Ed. 913, 932, (1906); 1 Kent Com. 12th Ed. 29; 1 Moore, International Law Dig. § 145, 142, 154 (1906); Westlake, International Law, 2d ed. pp. 187 et seq.; Wheaton, International Law, 5th Eng. ed. (Phillipson) p. 282; 1 Oppenheim, International Law, 3d ed. §§ 185-189, 252."

118 "That the political agencies of this nation both claim and exercise broad dominion and control over our 3-mile marginal belt is now a settled fact." U.S. v. California, 332 U.S. 19, 32-3, 91 L.Ed. 1889, 1896, (1947). Reconfirmed in Secretary of Interior v. California, 104 S.Ct. 656, 78 L.Ed. 2d 496, 506 (1984).

119 Jessup, supra note 5, at 49-60; McDougal and Burke, supra note 44, at 451 and 529-30 n.245; and Colombos, supra, note 4, at 109-110. See notes 91, 116, 117, and 118 supra.

120 See notes 105-107 supra, and accompanying text.

121 CTSCZ, supra note 43, Article 14. See extended discussion at note 2, supra.

122 Id.Article 19.

123 Jessup, supra note 5, at 49-50.

124 State v. Craig, 13 A. 129. (1808) upheld state authority to regulate fishing beyond 1 league (3 miles) from shore, if the activity can be shown to be contrary to state interests and if the defendant continued aspects of the crime within the state's jurisdiction. This case mentioned the 1 league distance as a defense to state (no mention of national) law, which implied that the common understanding was that state law governed. See also, Dunham v. Lamphere, 69 Mass. (3 Gray) 268, 270 (1855) concerning fishery control of the State of Massachusetts; the state court said, "We suppose the rule to be that these limits (of state authority) extend a marine league, or 3 geographical miles, from shore." And see McCready v. Virginia, 94 U.S. 391, 24 L. Ed. 248 (1877). . . (T)he States own the . . . fish in (the tidewaters)... There has been no grant of power (by the States to the federal government) over the fisheries. These remain under the exclusive control of the State.... Smith v. Maryland, 59 U.S. 18 How. 71, 74 15 L.Ed. 269,270(1855) ("Whatever soil below low-water mark is the subject of exclusive propriety and ownership belongs to the State on whose maritime border and within whose territory it lies..." Thus Maryland could regulate oyster beds.) Re-affirmed in Manchester v. Massachusetts, 139 U.S. 240, 266 (1890). See generally, American Digest (1658-1896), Centennial Edition, Vol. 23, pp. 1050-1082, §§16-31. See also Commerce Comm. Report, supra note 200, at 670.

[125] Manchester v. Massechusetts, 139 U.S. 240, 266; 35 L.Ed. 159 (1891). Arthur Manchester challenged the authority of the Massechusetts legislature to control fisheries in the coastal waters claiming that only the federal government had that authority. The Supreme Court disagreed and ruled that, absent a conflicting federal regulation, the coastal states may control fisheries out 3 miles from shore. at U.S. 254 to 266, L.Ed. 163 to 167.

[126] Examples of such treaties mentioning fishing are found at 8 Stat. L. 54, 56 (1782) [Treaty with Britain]; 10 Stat. L. 1089 (1854) [also with Britain]; 17 Stat. L. 863 (1871) [again with Britain]; and 23 Stat. L. 837 [1885] [Proclamation announcing the expiration of a fishery treaty between the U.S. and Britain.].

The chronology of the 19th century federal involvement in fishery regulation runs as follows:

1782 Provisional Articles between the United States of America, and his Britanic Majesty. 8 Stat. L. 54, 56(1782).

1818 Convention Respecting Fisheries, Boundary, and Restoration of slaves, United States and Great Britain. 8 Stat.L. 248 (1818)

1854 Reciprocity Treaty with Great Britain. 10 Stat. L. 1089 (1854).

1869 The establishment of a reserve for government purposes,(sealing regulation) on St. Paul and on St. George Islands, Alaska. 15 Stat. L. 348 (1869).

1870 Act to Prevent the Extermination of Furrbearing Animals in Alaska (More elaborate sealing regulation), 16 Stat. L. 180-82.

1871 Treaty between the United States and Great Britain. 17 Stat. L. 863 (1871).

1885 Termination of the 1871 treaty. 23 Stat. L. 837 (1885).

1887 An Act to regulate Mackerel Fishing, 24 Stat. L. 434.

1889 An Act to Provide for Protection of Salmon Fisheries, 25 Stat. L. 1009.

1889 Proclamation to regulate sealing, 26 Stat. L. 1543.

1892 Presidential proclamation (No. 39) establishing a fishery and wildlife conservation area on and around titles Afognak Island, Alaska 27 Stat. L. 1052.

1894 Prohibition of fishing in Potomac River with a view to encouraging spawning of shad fish. 28 Stat. L. 40.

1903 A law transferring the oversight of fisheries to the newly created Department of Commerce and Labor. "It shall be the . . . duty of said Department to . . . develop (sic) the . . . fishing industries." 32 Stat. L. Sec. 3 826.

1906 An act regulating the Alaska Salmon fisheries, 34 Stat. L. 478.

[127] A commissioner of fisheries was established Feb. 9, 1871 [16 Stat. at Large 593-4]. This title, "Bureau of Fisheries" occurs in the Scott & Beaman Index and Analysis of the Federal Statutes 405 [1783-1873] (1911) as the heading for the 1871 statute. Oddly enough, the text of the statute itself refers only to the Commissioner of Fisheries. But all subsequent entries in the Index (thru 1907) are under Bureau of Fisheries and yet refer only to "the Commissioner of Fisheries" (21 Stat. L. 302), "The Fish Commission" and/or "The Office of Fish and Fisheries" (32 Stat. L. 827) as though these 4 titles are interchangeable. See also, Knight, supra note 10 at 75.

[128] Policy of the United States with respect to Coastal Fisheries in Certain Areas of the High Seas, Proclamation No. 2668, 3 CFR 40 (1945 Supp.), reprinted in Department of State Bulletin 486 (1945). See also, Exec. Order No. 9634, 1945 U.S. Code Cong. & Ad. News 1315. (Executive order empowering Secretary of State to designate fishery conservation areas on the high seas.) See note 80, supra for brief discussion of the extent of Truman's claim.

[129] 16 U.S.C. § 1081, (1982) Pub. L. No. 88-308. The Bartlett Act "was the means by which the United States brought into force against foreign nationals the rights obtained pursuant to the 1958 Convention (on the Continental Shelf),...to control or prohibit the taking of fishery resources of the continental shelf." State v. Bundrant, 546 P.2d 530, 546 (Ak. 1976).

[130] 16 U.S.C. §§ 1091-1094; Pub. L. 89-658 (1982), 80 Stat. 908 (repealed along with the Bartlett Act in 1976 by 90 Stat. 360; Pub. L. 94-265; 16 U.S.C. 1851 (1976), the (Magnuson) Fishery Conservation and Management Act). There is some disagreement about whether or not the Truman proclamations were ever actually implemented by legislation. "The Truman Fisheries

Proclamation was never, however, implemented into law." Commerce Comm. Report, supra note 200, at 661. However, the accuracy of this assertion is disputed by some significant facts. In 1966, 16 USC §§1091-94, 80 Stat. 908, explicitly claimed exclusive fishery management control in the high seas contiguous to U.S. territorial waters. The legislative history of 16 USC §1091 quoted the Truman proclamation (No. 2668) at length to show that 2668 was the precedent. The same legislative history also contains several letters which use language similar to the 2668 proclamation. 1966 U.S.Code, Cong.,& Adm. News 3285-86, 3291-96.

At page 3282 there is a summary of the legislative history of the 1966 act. "(T)he 3-mile coastal range constituted the scope of the U.S. territorial waters . . . and it has remained unaltered to this day." And further, "For fishery purposes, (up to 1966) the 3-mile coastal range marks the end of our jurisdiction over foreign fishermen." at 3284-5. These two excerpts show the constancy of the 3-mile territorial sea and the limited role (up to this time) of the federal government in fishing regulation.

131 16 U.S.C § 1801, "The Magnuson Fishery Conservation and Management Act" (FCMA). (1982).

132 See note 102 supra and accompanying text.

133 See note 108, supra.

134 For discussion of "innocent passage," see note 62, supra.

135 CTSCZ, supra, note 43. Colombos discusses the development of the practice concerning warships, at 132-3, supra note 4.

136 CTSCZ, supra, note 46.

137 Telephone conversation with Jeff Greiveldinger, U.S. Dept. of State, Office of the Legal Advisor, February 11, 1985.

138 Colombos supra note 54 at 167. At one time, the United States claimed 16 defensive sea areas fully or partially within the territorial sea. See Exec. Order No. 10361, 17 Fed. Reg. 5,357, as an example of such an area.

139 CTSCZ, supra, note 43.

140 See generally American Digest, (1658-1896), Centennial Edition, Vol. 48, Waters and Water Courses, §§55-66.

141 CTSCZ, supra, note 43.

142 Id. art. 24.

143 33 U.S.C. §§ 1343, 1362(8)-(10) (1982).

[144] Executive Proclamation 2667, Sept. 28, 1945, 10 Fed. Reg. 12,303 (Sept. 28), 59 Stat. 884 (1945).

[145] United States v. California, 332 U.S. 19, 38, 91 L. Ed. 1889, 1899 (1947).

[146] "As early as 1894, oil had been extracted from wells off the cost of southern California. Offshore drilling, however, was confined to shallow, near-shore waters because technology was unsophisticated." Shelf Energy Resources, 11 Pepperdine Law Review, 27 (1983).

[147] Submerged Lands Act, 43 USC § 1301 et seq. (1976 & Supp. V. 1981) (hereinafter referred to as SLA.)

[148] Outer Continental Shelf Lands Act, 43 USC 1331 et seq.(1976 & Supp. v. 1981). (hereinafter referred to as OCSLA). Section 2302 specifically refers to the Continental Shelf and directly confirms legislative jurisdiction over the Shelf. See also 1953 U.S. Code, Cong., & Adm. News 1391 for statement asserting implementation of Truman's (mineral) Proclamation 2667.

[149] See note 157 infra

[150] 50 U.S.C. § 191 (1972).

[151] 18 U.S.C. §3241 (1972).

[152] Article 24 of the Convention on the Territorial Sea and the Contiguous Zone(CTSCZ), supra, note 43. However, see note 154, supra, and see text at notes 157-164, infra, which discusses the reach of U.S. law beyond 12 miles.

[153] Outer Continental Shelf Lands Act, 43 USC 1331 et seq. See § 1333.

[154] 43 U.S.C. 1333 (a) (1982). However, Treasury Department publication VES-3-15 CO:R:CD:C 105861, p.2, comments that the federal customs laws may reach beyond 200 miles in some places, and less than 200 miles in others, depending on the extent of the continental shelf. However, presumably the EEZ Proclamation (infra note 163 and text) extends U.S. jurisdiction out at least 200 miles at every point.

[155] Snyder v. Motorist Mutual, 206 N.E. 2d 227, 230 (1965).

[156] Employers Mutual Casualty v. Samuels, 407 S.W. 2d 839, 843-5 (Tx. 1966).

[157] State v. Bundrant, 546 P.2d 530, 550-1 (Ak. 1976). The court acknowledged its control stopped at the relevant zone for non-citizens of the state but held that the state had no geographical limit on its control of its own citizens in matters affecting state interests. On this basis, Alaska had

jurisdiction over a fishing incidents which took place up to 60 miles from shore because the boat was registered in Alaska.

[158] CTSCZ, arts. 19,20,& 24; supra note 43.

[159] The federal authority is found at 18 U.S.C. § 7 (1972). See also, United States v. Green, 671 F.2d 50 (1st Cir.1982).

[160] United States v. Postal, 589 F.2d 862 (1979). This case is outstanding for its unusual analysis. Essentially, the court said that the violation of the treaty did not invalidate U. S. Jurisdiction to arrest the defendant because the treaty provision (art. 6) was not self-executing (discussion at 876-884). The opinion even referred to the British practice under which no treaty becomes part of national law without specific enabling legislation, at 883, referring to n. 25 on 878. The court's reliance on the admittedly imprecise self-execution analysis and on the intent of the signers would seem to render those provisions of the CTSCZ meaningless for now and leave U. S. jurisdiction in such a case almost wide open. Subsequent federal court rulings have continued this approach: United States v. Columba-Colella, 604 F.2d 359,360 (5th Cir.1979), United States v. Streifel, 507 F.Supp. 480 (S.D.N.Y.1981); United States v. Green, 671 F.2d 50 (1st Cir.1982).

[161] Id. at 872-874. The arrest violated the CTSCZ, Act. 24 and the Convention on the High Seas, Arts. 2 and 22, supra notes 87 and 88.

[162] United States v. Rubies, 612 F.2d 397 (1979). The courts reliance on the apparent statelessness of the vessel for its ruling that treaties did not protect the defendants or the boat leaves undiscussed the role of customary international law which is based on accepted rights and limitations established by practice, not by treaty agreement. Even stateless boats and persons would seem to be protected by customary international law, or alternately, all nations would seem to be restrained in their exercise of jurisdiction on the high seas, by the existence of clear international customary law.

[163] Id.

[164] United States v. Thompson, 710 F.2d 1500 (5thCir.1983); United States v. Demanett, 629 F.2d 862 (Cir.1980), cert.denied 470 U.S. 910.

[165] Exec. Proc. No. 5030, 43 Fed. Reg. [no. 50] 10605 (March 10, 1983) 1983 U.S. Code Cong. & Ad. News Vol.3 A28. The general message of the presidential statement released with the proclamation (See note 101,supra) is to the effect that the U.S. will follow most of the UNCLOS provisions. However, 3 months later, Brian Hoyle, Reagan's Deputy Director of Oceans, Environment, and Science in the Department of State, said, speaking at the 7th Annual Conference by the Center for Ocean

Management Studies at the University of Rhode Island, that (a) the U.S. would continue to use traditional international law in determining its ocean policy and b) there was no need for any comprehensive, coordinated ocean law since the traditional law of the sea was adequate. The United States without the Law of the Sea Treaty: Opportunities and Costs, Seventh Annual Conference, Center for Ocean Management Studies, 95 (1983). The inconsistencies between Reagan's EEZ message and the State Department's view (according to Hoyle) have yet to be explained.

166 Texas and Florida have 9-mile state waters due to historic claims recognized by the Supreme Court. This does not affect the law discussed in this article and will generally be ignored. See notes 194, 195, 196, 197 and accompanying text, infra.

167 44 U.S. (3 How.) 212 (1845)

168 41 U.S. (16 Pet.) 367, 410 (1842)

169 Id. at 410.

170 Frederick A. Eustis, Constitutional Law (re: Federal Government's rights to the seabed beyond 3 miles) 15 Va. Journal of International Law 1009, 1010.

171 Cf. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 470 (1793) documenting state charter description of claimed offshore rights. See also Flaherty, Virginia and the Marginal Sea: An Example of History in the Law, 58 Va. Law Review 694 (1942). References appeared in Constitutional Law, supra note 170, at 1010. See HR Rep. No. 1778, 80th Cong. 2d Sess. accompanying HR 5992, at 1,2,3,16 (Apr.21, 1948), which thoroughly asserts the long-standing belief that the states controlled the 3-mile territorial sea bottom. In the landmark case itself, U.S. v. California, [332 U.S. 19, 36, 91 L.Ed. 1889, 1898 (1947)], the Supreme Court admitted that the language of the Pollard case did indicate a belief that the states owned the sea bottom out 3 miles from land. 332 U.S. at 36.

172 1953 U. S. Code Cong. & Ad. News 1417.

173 332 U.S. 19, 38 (1947).

174 "The Federal Government rather than the state has paramount rights in and power over that (3-mile) belt." Id. at 38.

175 Justice Reed's dissent in U.S. v. California explicitly discussed the previous assumption of state ownership of the land in the 3-mile zone. 332 U.S. at 43. See also, 1953 U. S. Code Congress & Ad. News 1417. See also note 149 Supra.

[176] In 1946, a resolution quieting title to submerged lands within the 3-mile limit in the states passed as House Joint Resolution 225 [92 Congr. Rec. 9642, 10316 (1946)]. President Truman vetoed this resolution the same year [92 Congr. Record, 10660(1946)] so as to let the Supreme Court decide the United States v. California case (supra note 171) then under consideration. In 1952 the 2 houses of Congress finally produced another version (S.J.20) of the joint resolution which they could send to Truman. However, Truman vetoed this joint resolution also on May 29th, 1952. See 1953 U.S. Code Cong. & Ad. News 1418. Additionally, in United States v. Louisiana, the Supreme Court sketches the history of congressional attempts from 1938 to 1953 to establish territorial (3-mile) title in the coastal states. 363 U.S. 1, 6, 4 L. Ed. 2d 1026, 1032, n. 4 (1960).

[177] 1953 U.S. Code Cong. & Ad. News 1499.

[178] Submerged Lands Act(SLA),43 U.S.C. §§ 1301 et seq. (1982).

[179] H.R. Rep. No. 215,83d Congr., 1st Sess. 15 (1953).

[180] Outer Continental Shelf Lands Act(OCSLA), 43 U.S.C §§ 1331, et seq. (1982).

[181] 43 USC §§ 1301(a), 1311(a), (b), and (c)(1982).

[182] 43 USC § 1301(e) and § 1311(a)(1982).

[183] 43 USC § 1311(a)(2)(1982).

[184] 43 USC § 1311(d)(1982).

[185] "The United States retains . . . navigational servitude . . . rights in and powers of regulation of (submerged) lands and navigable waters for . . . commerce, navigation, national defense, and international affairs . . . and . . . (during wartime) the right of first refusal . . . to purchase . . . the natural resources (from the 0 to 3 mile-wide belt.) 43 U.S.C. 1314 (1982).

[186] 43 U.S.C. §1314(a) (1982).

[187] See the quote in text at note 179 supra.

[188] See the quote in text at note 186 supra.

[189] Zabel v. Tabb, 430 F.2d 199 (5th Cir.1970).

[190] Id. at 206. Quoted in Ball, infra note 216.

[191] United States V. Louisiana, 339 U.S. 699, 94 L.Ed. 1316(1950), and United States v. Texas, 339 U.S. 707, 94 L.Ed. 1221 (1950). The Supreme Court ruled, in the case of Louisiana,

that the state never acquired ownership in the marginal sea, at 704. In the case at Texas, the Supreme Court held that the use of the phrase, "on equal footing" with the other states, removed any special claim which Texas might have had to the marginal sea (territorial waters) out to 3 leagues, at 715, et seq.

[192] 43 USC §§1311,1312(1982). "Nothing in this section is to be construed a questioning or in any manner prejudicing the existence of any State's seaward boundary beyond 3 geographical miles ...." at §1312.

[192] See infra, notes 194 and 196, for the cites to the 2 cases which decided the claims of the 5 states.

[194] United States v. Louisiana, et al 363 U.S. 1, 4 L.Ed. 2d 1025 (1960). The claim of Texas was accepted due to the wording of the Texas constitution and of assurances made in Congress when Texas was admitted to the United States. at U.S. 36 to 64, L.Ed. 1049 to 1065.

[195] Id.

[196] United States v. Florida et al., 363 U.S. 121, 4 L.Ed. 2d 1096 (1960). Florida's claim was accepted because of the wording of the state constitution used when Florida was re-admitted to the Union after the Civil War. That constitution contained boundary references of "3 leagues from the mainland" in the Gulf. at U.S. 123, L.Ed. 1098.

[197] See notes 97-103 in the first section of this paper. The last Supreme Court case which reiterated the long-standing claim by the United States to a 3-mile territorial sea is Secretary of Interior v. California, 194 S.Ct. 656, 78 L.Ed. 2d 496, 506(1984).

[198] Actually, these "anomalies" are discussed by the Supreme Court in United States v. Louisiana et al., 363 U.S. 1, 4 L.Ed. 2d 1025, (1960). The Court concluded that historical differences in the boundaries of states which were recognized by the federal government permit variations in ocean boundaries, even if this variation would give some states more resources than others. As to state limits beyond national limits, the Court, first, referred to testimony pointing out that the federal government had already claimed sovereignty over fish and minerals vis-a-vis other nations, thus establishing national control far beyond the possible 9 mile reach of a given state. Secondly, the larger 9-mile limit for Florida and Texas was essentially a legal arrangement delineating rights and duties between the federal government and the states. Therefore, it was a purely domestic division of authority. at 1042-1049.

[199] Notes 194 and 196, supra.

[200] A 1970 statement by the U.S. Department of State reflected this traditional policy quite clearly. "International law provides no basis for these proposed (Canadian) unilateral extensions of (pollution control) jurisdiction on the high seas, and the United States cannot accept nor acquiesce in the assertion of the such jurisdiction.... If Canada had the right to claim...exclusive pollution and resources jurisdiction, on the high seas, other countries could assert the right to exercise jurisdiction for other purposes, some reasonable and some not, but all equally invalid according to international law. U.S. Dept. of State, Press Release, No. 121, April 15, 1970. Reprinted in Staff of Senate Comm. on Commerce, 94th Cong., 2d Sess., Legislative History of the Fishery Conservation and Management Act of 1976, 660(Comm.Print 1976), Gov. Doc. No. Y4.C73/2:F53/13. at 599-600. [hereinafter referred to as Commerce Comm. Report].

Later the same year, in protest over a Canadian move to establish fishery closing lines unilaterally, the American State Department said: "The United States regards this unilateral act as totally without foundation in international law. Id. at 600.

[201] Exec. Proc. No. 2667, 10 Fed. Reg. 12, 303, 59 Stat. 884 (Sept. 28, 1945). He also claimed control over some fisheries on the high seas lying contiguous to American territorial waters: Exec. Proc. No. 2668, 3 CFR 40, (1945 Supp.).

[202] (OCSLA) 43 USC §1331 et seq.(1982). See note 203 infra, for comment on enactment of the continental shelf mineral claim, and note 189 for a fuller discussion.

[203] (SLA) 43 USC §1301 et seq.(1982) Additionally, §1302 of the SLA specifically enacts the claim of U.S. mineral jurisdiction on the "Continental Shelf."

[204] OCSLA, supra note 202 at § 1331(m) and (o), and § 1332(1) and (3)(1982).

[205] Id. at § 1333(a)(1).

[206] Id. at § 1333(a)(2). One specific reservation of federal law was the application of federal workers compensation law to accidents on oil rigs in the outer continental shelf area (OCS). Section 1333(b) specifies that compensation is to be paid through the Longshoremen's and Harbor Workers Act, 33 USC 901 et seq (1982).

[207] Exec. Proclamation No. 2668, 10 Fed. Reg. 12,303; 3 C.F.R. 67; reprinted in 59 Stat. 885 (1945).

[208] 16 USC § 1081-86, repealed in 1976 at 90 Stat. 360 by the FCMA, 16 USC 1801.

[209] 16 USC § 1091-1094 (1982), repealed along with the Bartlett Act in 1976 at 90 Stat. 360, Pub. L. 94-205, 16 USC § 1801.

[210] Magnuson Fishery Conservation and Management Act(FCMA) 16 USC § 1801,et seq.(1982)

[211] The United States had been one of the staunchest proponents of the 3-mile width since the 1800s and continued as such into the 1980s. See Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, 49-60 (1927); Meyers McDougal and William Burke, The Public Order of the Oceans, 451 and 529-30, n. 245 (1962). See also supra note 116 and 200.

[212] 16 U.S.C. § 1811 (1982).

[213] There are 8 Fishery Management Councils: (1) New England Council, (2) Mid-Atlantic Council, (3) South Atlantic Council, (4) Caribbean Council, (5) Gulf Council, (6) Pacific Council, (7) North Pacific Council, (8) Western Pacific Council. 16 U.S.C. § 1852(b)(2) (1982).

[214] Id. §§ 1852(h) and 1854(b)&(c).

[215] Id. § 1856(b).

[216] In 1978, Milner S. Ball wrote on changing the territorial boundary out to 12 miles. He discussed the specific laws mentioning that even inland states may be entitled to OCS revenue sharing monies, at 53. He mentioned various management alternatives for production in the OCS: "One (suggestion) calls for regional outer continental shelf advisory boards with State representation ... Others include types of public corporations like COMSAT or the formerly proposed Federal Oil and Gas Corporation; or public authorities on the model of the New York Port Authority, the Tennessee Valley Authority, or the Delaware River Basin Commission. There have also been proposals for an authority more like a fifty-first State and for a Federal Oceania." Milner S. Ball, LAW OF THE SEA: Federal-State Relations, 56, occasional paper of the Dean Rusk Center for International and Comparative Law, University of Georgia (1977).

Robert Knecht and William Westermeyer, wrote in 1984 and they list 7 different possibilities to manage the 0-12-mile coastal waters after the 12-mile change. The first 2 parallel the 2 scenarios presented in this article. Number 3 would divvy up the revenues evenly among all the coastal states, though no explanation is given as to why the wealthier coastal states would want such an arrangement. Suggestion 4 refers to a 6-6 split between the coastal states and the federal government in the new 12-mile zone; not an unlikely possibility but one raising no questions of law different from our scenario 2. The fifth and sixth refer to joint federal-state management and a regionalization to be applied in the territorial sea, which is a very interesting idea and similar to Ball's. The final alternative, number 7, divides the coastal waters, not by geography, but by activity. While the last arrangement would affect a great deal of domestic law, its

feasibility is sufficiently in doubt so that it is not explored in this article. Absent from this collection of possibilities is any mention of the landlocked states' interests. State vs. National Interests in an Expanded Territorial Sea, 11 Coastal Zone Management Journal 317, 328 (1984).

217 United States v. California, supra, note 171 at U.S. 38, L.Ed. 1899..

218 In fact, when Congress did extend the fishery control in 1966, it explicitly stated that the expanded fishing zone did not expand state reach. 16 USC §1094 (repealed by the FCMA, supra note 212).

219 16 U.S.C. §1451 (1982).

220 Id. at § 1453(1).

221 Another example is found in the Deep Water Ports Act which defines deep water ports as those located "beyond the territorial sea." 33 USC §1501(a)(1) & 1502(10) (1982). Suddenly, any such ports within the 3 to 12 mile range would lose their "deep water" status.

222 Refer to the chart at Appendix at the end of this article for a graphic explanation of "Zone A," etc.

223 OCSLA, supra note 202, at § 1331(m) and (o) and §1332(1) and (2). The OCSLA re-affirmed federal control of mineral resources.

224 Magnuson Fishery Conservation and Management Act(FCMA), 16 U.S.C. §§1801, 1811(1982).

225 "Customs waters" are defined in 19 U.S.C. §1401(j) as waters within 12 miles of the U.S. coast. However, case law has permitted customs jurisdiction to extend out as far as 150 miles; See United States v. Rubies, 613 F.2d 397 (9th Cir.1979), infra note 232 and accompanying text.

226 Marine Protection, Research, and Sanctuaries Act of 1972, 33 USC §§ 1401, 1411(b)(1982).

227 See footnotes 99-101 supra and accompanying text.

228 Exec. Proc. No. 5030, 43 Fed. Reg. [no. 50] 10605 (March 10,1983), 1983 U.S. Code Cong. & Ad. News Vol.3 A28. See also accompanying statement: 19 weekly comp. Pres. Doc 383 (March 10, 1983).

229 43 U.S.C. 1333(a)(1982). The federal district courts have jurisdiction and they use federal law, but where not consistent with federal policy or legislation, the law applied is that of the adjacent coastal state.

[230] See note 159 supra.

[231] CTSCZ, supra note 87, arts 19 & 24;), and also Convention on the High Seas supra note 88, art. 2.

[232] United States authority over foreign vessels involved in criminal activity rests on 2 legs: 1 domestic and 1 international. The domestic law is the federal statute 19 U.S.C. §1581(a) (1982) which authorizes customs officers to board any vessel in customs waters, which are defined in 19 U.S.C. §1401(j)(1982) as the waters within 12 miles from shore. The regulations at 19 C.F.R. §162.3, reiterate the authority of customs officers to board, but specifically state that these officers may not board a foreign vessel on the high seas, that is, beyond 12 miles. [at §162.3(3)]

The international leg is made up of (a) the Convention on the Territorial Sea and the Contiguous Zone (CTSCZ).[15 U.S.T. 1606, TIAS 5639 (1958)] and the convention on the High Seas, supra note 88. The first convention permits the arrest of foreign ships or persons within the territorial sea for any crime which impinges on the coastal nation [Art. 19(1)]. Arrests beyond 3 miles, but within 12 miles, are allowed only for a smaller number of offenses related to customs, fiscal, immigration, or sanitary requirements of the coastal nation.[Art.24] The Convention on the High Seas , Art. 23. In harmony with the federal regulation above, the High Seas treaty also forbids arrests of a ship on the high seas--beyond 12 miles--except for piracy or slave trading. [Arts. 13 and 22(1)(b)(1958).

In spite of the foregoing, at least 2 federal courts have handed down decisions which seem to come close to overriding the federal law and the treaty. In United States v. Postal [589 F.2d 862(5th Cir.1972)], the court allowed the arrest of a foreign drug smuggler beyond the 12-mile limit. The court specifically discussed the CTSCZ and explained that the treaty was not self-executing, meaning that the treaty was unenforceable until acted on by legislative or administrative action. Considering the existence of the federal law cited above [19 U.S.C. 1581(a) and 19 C.F.R. 162.3], this assertion by the court is mystifying. In United States v. Rubies (613 F.2d 397, 9th Cir. 1979], the arrest 150 miles out at sea stood because the foreign defendant's boat was considered "stateless" and thus not entitled to the coverage of the international treaties. See discussion at notes 160-162 supra and accompanying text. In both these cases, the court focussed on the treaties in order to come to its conclusion permitting the exercise of U.S. authority on the high seas; but the reasoning of the two courts completely ignored customary international law which applies to nations even where there is no applicable treaty.

A territorial limit change would seem to extend U.S. authority which is focussed in the territorial sea (e.g. control of shipping) out an additional 9 miles. But the most frequently exercised authority, that related to drug smuggling, already reaches out 12 miles.

[233] CTSCZ, 15 UST 1606, TIAS 5639(1958), Art. 20.

[234] Id. at Art. 20(1).

[235] See U.S. v. California, supra, note 80. See note 218 supra.

[236] 43 U.S.C. §1301(a)(2)(1982).

[237] See table in Appendix at end. The oil and gas figures are from a phone conversation with Ronald Prehoda in the Office of Mineral Management Service, Department of the Interior Reston, Virginia with Bo Bricklemyer, February 7, 1984. The figure, $31.60, is the result of dividing the total oil income by the number of barrels produced. The royalty figure used is 16.67% and comes from the Congressional Research Service, Outer Continental Shelf Leasing: Accelerated Program, Issue Brief No. 83065 [IB83065] (1983) (Tel. (202) 287-5700)(Author: Malcolm Simmons).

[238] See chart at Appendix at end. Reference to the zone from 3 to 12 miles also refer to the corresponding zone from 9 to 12 miles off Texas and Florida.

[239] See Appendix.

[240] This figure is an approximation due to the deletion of decimal places.

[241] The population of the United States, as of the 1980 census, was 226,504,825. Source: 1984 World Almanac 199.

[242] The FCMA requires that foreign fishers, not Americans, pay a fee to cover the cost of administering the FCMA in proportion to the percentage of fish taken by those foreign fishers. FCMA 16 USC § 1824(b)(10)(1984). So far, this amount collected from the foreign fishers has not exceeded the ratio of the fish taken from the FCZ, though the federal government does assert the authority to charge more than the amount necessary to cover the costs. 49 Fed. Reg. 40615, Oct. 7, 1984 and 50 Fed. Reg. 460, Jan.4, 1985. If this method is continued, then the change in the territorial sea leading to a change in the FCZ area, would result in no net change in revenue because the decrease in money brought in would correspond to the decrease of federal costs required. The net impact would be static. This means that the change of the territorial sea limit, if it included a change of FCZ boundaries, would not materially impact the federal treasury.

[243] With respect to Mississippi, the industry value is ca. 45 million dollars. Fees etc. come to $250,737, a mere 0.5% of the industry worth. Basically, the Mississippi fees just cover the administration costs. Information from an Oct. 23, 1984, phone call to the Mississippi Bureau of Marine Fisheries.

[244] FCMA, supra note 224.

[245] "The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal states." FCMA, 16 USC §1811 (1982).

[246] Of the fish caught within the 200 mile zone of the United States and landed in the United States, 65% comes from the 0-3 zone. Fisheries of the United States, 1982, 11, National Fishery Statistics Program, National Oceanic and Atmospheric Administration, U.S. Dept. of Commerce. It is difficult to get a nationwide breakdown of statistics showing precisely what percentage come from the 3-12-mile zone because the west coast states do not keep statistics (for 1982) for that zone. However, the National Marine Fisheries Service provided data (excluding shrimp) covering Louisiana, Mississippi, and Alabama which showed that in 1982, 87.2% of the fish came from the 0-3-mile zone, 8.2% came from 3-12, and 4.5% came from 12 to 200. These partial statistics nevertheless show that most of the fish are found within 12 miles of shore. There is an interesting counterpoint, however. Even though the data would indicate that the states, by controlling the territorial sea, already control 65% of the fisheries, this is 65% by poundage. The dollar value of the fish caught from 0-3, [$1,199,516,000] amounts to only 52% of the take in the 0-200 mile zone [$2,287,857].

[247] "The United States' approach to marine fishery management in the past may be considered haphazard at best. Our federal fishery management legislation resembled a crazy patchwork quilt of pieced-together remnants.Generally its basis was not in resource information, landing statistics, and data, but in weakly divided authority, inadequate enforcement, and complex jurisdiction. The authorizing legislation itself was more a collection of single purpose statutes and international arguments loosely coupled through the commonality of fisheries." Warren G. Magnuson, The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Resources, 52 Wash. Law Review 427, 432 (1977).

[248] Milner Ball makes a similar point when he says, in reference to Congress ceding expanded coastal territory to the states, "Congress might grant to the States something less than title..." Ball, supra note 216 at 29.

[249] However, the regionalization of the full range of activities in the coastal area suggested by Knecht and Westermeyer were implemented to replace the FCMA arrangement, supra note 216.

[2] As of 1981, 24 nations still retain a 3-mile limit; 80 claim a 12-mile territorial sea. Limits, supra note 26, at 8. Writing in 1984, Robert Knecht and William Westermeyer said, "At the present time, 104 of the 137 independent coastal nations have

territorial seas of 12 miles or more." Knecht and Westermeyer, Supra note 196, at 320.

251 In addition to some measure of control over shipping in the territorial sea, the CTSCZ requires that submarines in the territorial sea operate on the surface and does not provide "innocent passage" for aircraft (CTSCZ, Art. 14(6), supra note 43). The control over shipping within the territorial sea is greater than that available to the coastal nation over ships and aircraft outside of the territorial sea.

252 These restrictions, and others, are found in the UNCLOS treaty, supra, note 83 at articles 19 and 20 and represent the regime these 12-mile territorial sea nations will be adhering to. In any case, the traditional reasons for which the United States military sector sought a narrow territorial sea, the corresponding ability for the movement of United States shipping close in to other coasts (supra note 109), will have largely evaporated because of the dominance of the 12-mile limit.

253 This figure is based on the 1982 oil and gas prices and production amounts. Of course, it will go up as both the prices and the volume of oil and gas from that "Zone A" increases. Other minerals taken from Zone A will also add to that revenue figure.

254 See supra note 179 ,and accompanying text.

255 The coastal states having SLA territory are the following: (1)Maine, (2)New Hampshire, (3)Massechusetts, (4)Rhode Island, (5) Connecticut, (6)New York, (7)New Jersey, (8)Delaware, (9)Maryland, (10)Virginia, (11)North Carolina, (12)South Carolina, (13)Georgia, (14)Florida, (15)Alabama, (16)Mississippi, (17)Louisiana, (18) Texas, (19)California, (20)Oregon, (21)Washington, (22)Alaska, and (23)Hawaii.

256 As of 1980, the population of Nebraska was 1,569,825. Source: 1984 World Almanac 244.

257 More precisely, $8,665,434.

258 Secretary of the Interior v. California, 78 L.Ed.2d 496; 104 S.Ct. 656 (1984).

259 Coastal Zone Management Act, 16 U.S.C. § 1451, 1456(c)(1) & (3) (1982).

260 The differences can be summed up briefly. As of February, 1985, the OCS revenue-sharing plan exists in proposal form only as H.R. 5 (introduced by Rep. Walter B. Jones) and S.55 (introduced by Sen Ted Stevens). The federal government would set aside a maximum of approximately $300,000,000 to be shared among the coastal and the Great Lakes states (35 states; $2.35 per person). However this money, and average of $8.57 million dollars per states, would be distributed according to a 5-part

formula which looks at coastline length, production facilities, population and so forth. Additionally, this money would be subject to the appropriation process, which implies that some Congress may not appropriate it during a given year. The 50-state revenue-sharing plan, on the other hand could divide whatever Zone A mineral revenues there were (in 1982: $1,250,436,000) among all 50 states (an average of $25 million per state; $5.52 per person). The money could be distributed on a per capita basis and thus avoid any appropriation process; it could simply belong to the several states regardless of changing budget priorities.

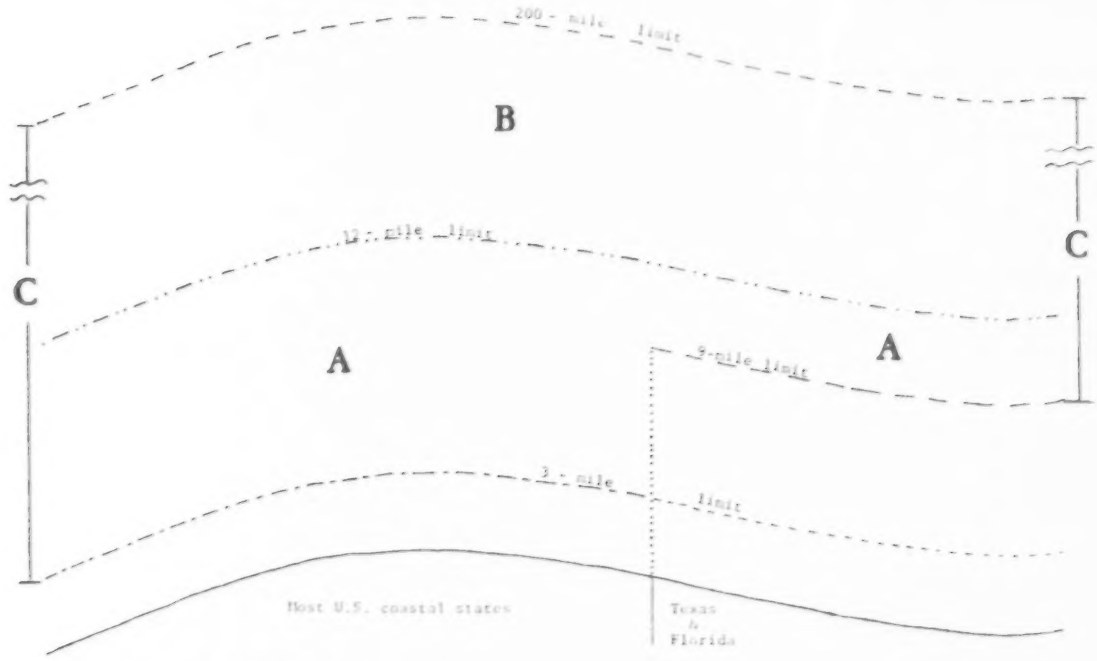
[261] In the Senate, 54(%) of the 100 votes "belong" to the landlocked states and 46(%) to the coastal states. However, in the House, it is the reverse: 191 votes (44%) of 435 votes come from landlocked states and 244 (56%) from coastal states. To get a millimeter of Zone A (see Appendix), the coastal states must have the cooperation of the landlocked states. To get a penny of Zone A mineral revenues, the landlocked states must have the cooperation of the coastal states.

[262] See note 237, supra.

[263] Knecht and Westermeyer, Supra note 216.

[264] Id. at 322.

APPENDIX



1982 Oil & Gas Production Beyond the State Boundaries *

Zone	Oil Produce in Barrels	Value of Oil**	Value of Oil Royalties Paid to Fed. Gov.	% of OCS Oil Prod.	Gas Produced in Thousand Cubic Feet Units (Mcf)	Value of Gas***	Value of Gas Royalties paid to Fed. Gov.	% of OCS Gas Prod.	Total Value Oil & Gas Royalties Together	% of Total OCS Income to Fed. Govt.
A state boundary* to 12	142,586,293	$ 4,505,726,859	$ 751,104,667	44%	1,123,082,705	$2,995,391,648	$499,331,788	24%	$1,250,436,455	33%
B. 12-mile limit to 200 miles	178,594,126	$ 5,643,574,382	$ 940,783,850	56%	3,556,428,567	$9,424,535,702	$1,571,070,101	76%	$2,511,853,951	67%
C. state boundary* to 200 miles	321,180,419	$10,149,301,241	$1,691,888,517	100%	4,679,511,272	$12,419,927,350	$2,070,401,889	100%	$3,762,290,406	100%

* The state boundaries reach out to the 3-mile national territorial limit except for the Texas boundary and the Gulf boundary of Florida which reach out 9 miles (6 miles beyond the U.S. territorial sea), due to historical claims.

** Value obtained by multiplying barrels of oil by approximately $31.60, the per barrel price.

*** Value obtained by multiplying each Mcf of gas by approximately $2.65, the price per Mcf.

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